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ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

M E E T I N G

at

T O R O N T O

on



FRIDAY, JANUARY 15TH, 1971

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VERBATIM REPORT OF PROCEEDINGS







Meeting held in the Board Room, 6th floor,

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

PRESENT:

Mr. H.I. Macdonald (Chairman)

Professor A. Brady

Professor J. Conway

Professor D.G. Oaignton

Professor W.B. T. M E E T I N G

Professor B.C. McIvor

Professor E. McWhinney at

Professor J. Mc T O R O N T O

Mr. J.H. Perry

Professor T.H.A. Symon on

FRIDAY, JANUARY 15TH, 1971

Mr. E. G. Graham

Mr. A.H. Dick

Mr. J.C. Thetner

Mr. B.A. Hanson

Mr. S.W. Stevenson

Mr. J. Burkes

Mr. S. Pohen

Mr. M. Mailhot

Mrs. L. Bowen

Mrs. J. Wilensky

Secretary

VERBATIM REPORT OF PROCEEDINGS

"Secrets" received from  
Professor P. and Mr. Siglin.









ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Meeting held in the Board Room, 6th floor,  
The Frost Building, Queen's Park, Toronto,  
on Friday, January 15, 1971.

PRESENT:

Mr. H.I. Macdonald (Chairman)

Professor A. Brady

Professor J. Conway

Professor D.G. Creighton

Professor W.R. Lederman

Professor R.C. McIvor

Professor E. McWhinney

Professor J. Meisel

Mr. J.H. Perry

Professor T.H.B. Symons

Mr. E. Greathed (Secretary)

Mr. A.R. Dick

Mr. J.C. Thatcher

Mr. H.R. Hanson

Mr. D.W. Stevenson

Mr. J. Burkus

Mr. G. Posen )

Mr. N. Mailhot )

Mrs. L. Bowen )

Mrs. J. Wilensky )

Secretariat

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"Regrets" received from  
Professor Fox and Mr. Séguin.







--- At 10:05 a.m.

THE CHAIRMAN: I would like to begin the meeting, if I may, and welcome you back after the last interval.

The first item is "Chairman's remarks". I think there are only two items I would report on. First of all, as I explained in my recent letter, the future for any number of things in the Ontario Government at the moment is somewhat uncertain but will in the course of time be clarified, I am sure. As I indicated, the Prime Minister was anxious that the Committee in this form continue its work in particular in preparation for the next working session of the Constitutional Conference early in February -- which I think, interestingly and appropriately, will be Mr. Robarts' last official responsibility on behalf of the Government of Ontario because I think the timetable is such that that two-day meeting immediately precedes the convening of the leadership convention in the following three days.

He also indicated that in his own opinion, in the work which is going to be perhaps gathering momentum in the next little while, he expected that this Committee or a similar new committee or some variation of this kind of activity would undoubtedly be required; but obviously he was in no position to read the mind of whoever might succeed, so I think we will







simply be crossing those bridges when we come to them.

I also mention that Eugene Forsey had, to my great regret and sorrow, resigned from the Committee. I tried as strenuously as I could to persuade him to change his view, but it seemed that my efforts did not counter-balance the collective persuasion of Senator Martin and Professor McGuigan. I don't know whether I was overwhelmed by quantity or quality or both, but whatever the reasons he decided that his position was such that he could not carry on, and he so advised the Prime Minister and me.

I don't think, gentlemen, I have any other introductory remarks.

PROFESSOR BRADY: Mr. Chairman, if this Committee should continue, I assume that what restrains Dr. Forsey from being a regular member of it would not restrain him from coming as a visitor on occasion and giving us of his wisdom.

THE CHAIRMAN: For my part I would certainly agree. The nature of my argument to him was that I thought in fact his membership of this Committee could be a very effective bridge between the two governments, between the two realms, and that I hoped that the process of constitutional review was not of such a partisan nature that it was not possible to maintain that kind of communication. I think it was a very







good idea, Professor Brady, to continue to involve him in that manner, if he were agreeable.

PROFESSOR CREIGHTON: Mr. Chairman, in bringing up the matter of the continuation of the Committee, have you done so with the idea of encouraging comments from the members of this Committee about its continuance?

THE CHAIRMAN: No, by no means.

PROFESSOR CREIGHTON: You don't want them?

THE CHAIRMAN: No, I did not bring it up with a view to discouraging any. I was merely reporting factually.

PROFESSOR CREIGHTON: I was wondering whether there was something that the Committee members might do which would make things easier for the incoming Prime Minister, whoever he may be. It might be that he might decide that this Committee has outlived its usefulness, and there are some of them (of which I am one) who are rather inclined to feel this way. Perhaps it might be better if we all sent in our resignations, and then he could decide whether he wanted to accept them or not.

THE CHAIRMAN: Mr. Robarts' opinion and wish certainly was to continue with the status quo, to let matters remain as they are, and to leave that prerogative in the hands of the new Prime Minister to act on.





We discussed the various possibilities, and, frankly, our feeling was that, on balance, the thing that might inhibit the new Prime Minister least in this regard is just to leave things as they are and not to ask for resignations, to encourage them or discourage them, but just to leave the situation as it is.

Any other general questions? Just on the orders of the day, then, it has been drawn to my attention that Professor Symons will be here only for the morning. I do not think this item perhaps would be one of undue length at this time, Tom, but we would be glad to move it up in the agenda to item 3, so that you may have a chance to express your views on it.

If there are no other items on topic 1, I might ask Mr. Greathed to report on item 2, if he would.

MR. GREATHED: Yes, Mr. Chairman. Just in a preliminary way on the mechanics of things, I believe coffee will be here around eleven and lunch was planned for twelve-thirty, if that is satisfactory to the Committee.

Also, I think that most of the members in this room know, most of the civil servants, perhaps with the exception of Mr. John Thatcher, our Deputy Minister of Energy and Resources Management -- who is sitting with Don Stevenson and is with us this morning to participate in the





environmental management discussion ---

THE CHAIRMAN: I should have introduced John, but my recollection is, John, that you were down at one of our Kingston seminars, and I think you maybe met a number then.

MR. GREATHED: Mr. John Burkus, who is sitting beside Mrs. Bowen, is a member of Mr. Honey's economic planning branch staff and is here because of his general responsibilities in some of the environmental and public retirement insurance areas.

Mr. Chairman, on the second item on the agenda, I think I can make a very complex report as simple as possible. The complexity is that our accounting procedures in our bookstore are really complex at this stage, and they are not entirely sorted out, but to the best of our knowledge we can report that approximately 600 copies of Volume 2, either singly or as part of the set, have been sold since the volume was published in September; and 300 complimentary copies have been distributed, most of which were to federal and provincial cabinet ministers particularly, of course, the Prime Ministers and Premiers, treasurers and Attorneys-General. All major libraries and newspapers in Canada were sent copies, and I would say approximately twenty or thirty specialized journals and publications in the United States, Canada, Britain, Australia and New Zealand were also





sent complimentary copies. I also had some report here -- yes, that 57 copies went to a variety of Canadian universities and colleges.

Promotional material, in other words the blurb for the book, was sent out to approximately 4,000 American university libraries, to 800 Canadian libraries -- well, approximately, I should say, about 2,000 Canadian libraries, university, private and public libraries.

The one disappointing feature I think, of Volume 2, is that there has been, to the best of our knowledge, no review of the book in either the English or French-speaking press of Canada. This puzzles us considerably, but it is just one of the facts of life, I guess.

PROFESSOR CREIGHTON: You ought to be pleased.

THE CHAIRMAN: I thought the problem was that all those conflicts of task were on the Committee.

PROFESSOR CONWAY: As a matter of fact there was a review in the "Vancouver Province" and the Telegram.

MR. GREATHED: We missed those entirely. Thank you, John. We will certainly look those up.

PROFESSOR CONWAY: Written by the editor.

MRS. BOWEN: Danny Sherman?

PROFESSOR CONWAY: Yes; then one by John Harbron.





PROFESSOR CREIGHTON: Oh, God!

MR. GREATHED: I think that is all I have to report on Volume 2.

MR. STEVENSON: You did see the Harbron one, Ed.

PROFESSOR CONWAY: I didn't.

THE CHAIRMAN: I think Ed saw it and just suppressed it. (Laughter)

PROFESSOR CONWAY: Did you see that?

MR. GREATHED: I am afraid I have no recollection. I have been told.

THE CHAIRMAN: He is suppressing it so well he can't even remember.

MR. POSEN: I certainly did see it published.

PROFESSOR CONWAY: If there was a review written by the editor of the "Province", do we have any kind of clipping service now that we know?

MR. GREATHED: I will certainly make a point of getting hold of it, and I will also check that Telegram copy.

THE CHAIRMAN: Any other questions? Certainly it is disappointing that it has not had that comment.

PROFESSOR McWHINNEY: Did you have a press conference for it?

MR. GREATHED: Yes, we did, with drinks. Unfortunately it was the same day that Jack McClelland was promoting Pierre Berton's book on





the C.P.R. and I think that has done very well.

PROFESSOR CREIGHTON: You ought to have chosen your day better than that.

PROFESSOR McWHINNEY: You ought to have chosen better libations, let's face it.

PROFESSOR CONWAY: There is absolutely no way of knowing.

MR. GREATHED: We have our attention drawn to a variety of newspapers, and I am surprised we have not seen that, but I will check it and send a copy around to the members. You don't have any idea of the date?

PROFESSOR SYMONS: Mr. Chairman, I don't think we should be too disappointed. I think it is a very healthy experience for our ego, and reminds us that our real constituency is the Prime Minister of the province.

PROFESSOR CREIGHTON: Hear, hear.

THE CHAIRMAN: I might also say we escaped the attention of the Legislature, which is not the case for the first time, so we should also be grateful for that perhaps.

Item 3 is the report on the constitutional review. Should item 6 precede this, or is this item also a review of practices and reports?

MR. GREATHED: It is as a report.

THE CHAIRMAN: I thought it was fairly brief and we might tie that in.

MR. GREATHED: Right.





THE CHAIRMAN: As to the constitutional review work, there was a meeting of the C.C.O. at the end of November, and there will be another one next week, and the working conference in February of the Prime Ministers. Ed, perhaps you can fill us in with some detail on that.

MR. GREATHED: Briefly, Mr. Chairman, despite the preoccupations of the country with the crisis in the fall, I think since the O.A.C.C. last met we have had one Constitutional Conference and, as the Chairman noted, one meeting of the C.C.O. We will be having another meeting of the Continuing Committee of Officials next week, and the next meeting of the Constitutional Conference will be February 8-10.

In the period between the September conference and now, we have been concerned primarily with the two topics that are going to occupy the attention of the Committee today, namely environmental management and the amending formula or amending procedures. I do not think I need say much more on that now, because members have received certainly a summary of the discussions on environmental management, and we really have not had much of a discussion in the C.C.O. on the amending procedures except in a very preliminary fashion at the meeting in November when the subject was just introduced. When we meet next week (the Continuing Committee of Officials) and





when the Prime Ministers meet next month (the Constitutional Conference) we will probably have on our agenda the three major topics which the Prime Ministers and Premiers were most concerned with in September, namely, the amending formula, environmental management and machinery of inter-governmental relations.

I might mention that there has been a fairly full, though informal, discussion of the Ontario paper (which this Committee contributed to in a major way) on machinery of inter-governmental relations. It is a little difficult to assess the nature of these comments because they were made not in a formal written way, but they were simply made in the course of a discussion.

I think -- and the Chairman and Don can correct me here -- that the major comments that were made about the paper, the major reservations that were expressed, were on the suggested constitutional provision that there should be formal requirements that meetings of First Ministers and finance ministers and treasurers be held annually. There seemed to be some uncertainty about the wisdom of that, but apart from that I think the paper was generally supported. I do not think there were any further detailed criticisms.

Frankly, what we are looking forward to now is equally comprehensive submissions brought from other governments, so that we can assess this



in some way, but I suspect that this topic is going to receive renewed attention in February, along, as I say, with the two major topics of environmental management and the amending procedures. I think that is all I have to say.

MR. STEVENSON: Looking at the notes of the meeting on that subject, Ed, I see probably two areas that might come out of that discussion on machinery that were not dealt with particularly in the Ontario paper, which might very well, in the next year or so as extensions of it; one being the clarification of the capacity of governments to enter into obligations with each other, and the form and nature of inter-governmental agreements within Canada. This obviously was a strong part of the Ontario position on this point, but this has never been dealt with to any detail in the constitutional discussions.

The Quebec people particularly were interested in definitions of consultation. If you have, for instance, in the distribution of powers an obligation to consult in certain areas which may or may not be concurrent, just what does this mean? In some of the grids of distribution of powers that have been discussed, particularly by Quebec and New Brunswick, there has been a clause under certain categories that although power may remain with the federal government it would have an obligation to consult with the provinces before





taking any action. Should this amount to any agreement?

MR. GREATHED: I think this is one of the particular federal comments, too. I don't think it was in November but I think perhaps in our meeting in late August or early September, they were also concerned about the meaning of "consultation" and if you express that very generally how you make it live more specifically, how to attach more meaning to that term. I suspected that they were going to follow this up with a paper, but they have not done so so far.

MR. STEVENSON: The other related one, perhaps relating more particularly to the Ontario paper, was where Ontario said that any five provinces should have the right to convene a federal provincial meeting, and there was quite a discussion on what this implied for attendance. Of course, there was nothing in the paper that implied compulsory attendance at meetings, but there is the question as to whether or not a meeting really means much unless people do attend it.

PROFESSOR LEDERMAN: Well, when you are dealing at the level of sovereign governments, you have to rest on the sense of obligation which the primary office holders have to obey the rules of the constitution. There is no way of putting a sheriff in.

PROFESSOR McWHINNEY: Although that





has been done in other federal systems.

PROFESSOR LEDERMAN: No doubt, but I would hate to see it done in this country.

PROFESSOR McWHINNEY: It was done in Australia, if you remember, in 1932.

PROFESSOR LEDERMAN: I hope we never get into that mess.

PROFESSOR McWHINNEY: I think we all so hope.

THE CHAIRMAN: If there are no other matters on that, I think we will come to the elevated item 6, which becomes item 4 -- post-secondary fiscal arrangements. Tom, I think in anticipation of the expiry of the present arrangements you wanted us to be thinking about that.

PROFESSOR SYMONS: Yes. I think we could devote just a very few minutes to it now, Mr. Chairman. It is an occupational comment, and I would thank you for your graciousness in referring to it as an elevated topic, which is perhaps because it is tired.

THE CHAIRMAN: I was speaking of the agenda rather than the environment.

PROFESSOR SYMONS: I think the important point about it is that the federal-provincial fiscal arrangements are to expire in about a year or so's time. While I think a prolongation of the present arrangements is agreed



upon, I think this is a very substantial issue not merely in terms of education but in terms of federal-provincial arrangements, the whole question of Canadian identity, the national goals and policies, and constitutionally. It is not just an educational question.

I wanted to raise it here because, as a person who is in education, I feel this is much too important a question to be left to educators, and I do not think it is adequate simply to have this looked at at the province's end by some body such as the Committee on University Affairs or the Department of Education. I think it needs to be looked at certainly by them, but it needs to be looked at also by this Committee and the Federal-Provincial Affairs Secretariat, so that it is set in a wider context for its constitutional implications, which are even more important, I think, than its educational implications.

MR. STEVENSON: You can be sure the financial people won't let them get away with it entirely by themselves.

PROFESSOR SYMONS: I am reassured, but I think it would be a pity if the concern and experience of this body and this secretariat, which has been acquired at some cost over the last half dozen years, did not have an opportunity to contribute to this tremendously important discussion in a series of negotiations.





That was my chief point, Mr. Chairman. I think it might easily have happened that this Committee took no opportunity to contribute to the consideration of these post-secondary fiscal re-arrangements, assuming that it was so much an educational matter that it would be dealt with adequately elsewhere. I think this would be a tremendous pity, a disservice to people engaged in education, and a failure to make use of the expertise that has been gathered in a wider context in the secretariat and in our Committee.

It may be that there is tremendous activity under way elsewhere in different pockets of the Ontario government system, but I am concerned that my observation from the university end is that there has been no approach from the province to the universities or to representatives in any shape or form to help draw upon the advice of post-secondary institutions for the preparation of the province's point of view on these matters.

At the same time, as long ago as nearly a year now, the federal government has been actively in touch with the post-secondary institutions to get their advice on its end of things.

I just think it is a great pity for the province, which has the primary responsibility in education, not to be doing even belatedly what the federal government is very actively doing.





I think the province does need to get in touch with people engaged in the activity of post-secondary education, not just universities but other post-secondary institutions. Then I think it would be helpful to have a discussion in the constitutional context and not just in the educational context. I think our Committee would play some role there. I think it would be very salutary and the province would get much better advice than it would get if it simply deals with educators.

THE CHAIRMAN: Thank you, Tom.

PROFESSOR SYMONS: One specific, Mr. Chairman, if it would help, that I would like to suggest is that if you and the other members of the Committee thought it worth while, I think it would be distinctly worth while to ask a small group from, say, the Committee of Presidents -- particularly Dr. Deutch of Queen's University, who is most active in the advanced planning in this work -- to join us for a part of a meeting when we might have this on the agenda. I think it would be helpful for us as a committee to be more aware of the kind of things that the people responsible for post-secondary education are concerned about; and I think it would be very helpful for them to get from this Committee the wider context which they may not see when they are so concerned about dollars that are necessary for the job they have to do.



PROFESSOR CREIGHTON: Could we ask the President to enlighten us as to how he sees the problem, because we are not very close to it; at least I am not.

PROFESSOR McWHINNEY: I was just about to ask the same thing. Are you anticipating, for example, the issue will be raised of direct general federal grants to universities, that sort of issue which has been discussed in Quebec and, if you remember, was refused in the Duplessis era and discussed again in the mid-1960's? Is that sort of basic policy issue which certainly would raise very basic federal-provincial conflicts, is that the sort of thing?

PROFESSOR SYMONS: Yes, many other things like it. I think the whole thing is up for grabs; it may go any way. Eight months ago the federal government was seriously toying with the idea, in keeping with some of the constitutional philosophy of the Prime Minister, of getting as completely out as possible.

PROFESSOR McWHINNEY: Out?

PROFESSOR SYMONS: Right out. Well, the implications are just devastating. It appears that in the last four or five months, largely as the result of the very skilfully planned and conducted mini-conference by Dr. Deutch of Queen's this summer, they have flip-flopped and they are now staying in and contemplating





developing, for the first time really, a very serious educational secretariat. It has not made a public decision and it is not to be taken for granted that it is going to occur.

Really what is going on is a decision fundamental to Canadian federation of whether the federal government is or is not going to have a serious role in post-secondary education, in research, and in culture.

At the moment it seems that they have reversed their view, all of which is without any public discussion or recognition, of six months ago, and that they are now looking around for able people and proposing to develop a serious secretariat of some permanence; but it could just as easily flip-flop again in the course of the next few months, and the public, the universities and, to a substantial extent the provincial administrations, I think, are quite oblivious of the fact that this background situation is going on.

PROFESSOR McIVOR: I think it is fair to say, is it not, Tom, that the Committee of University Presidents, noting the issue you mention that the present federal-provincial fiscal arrangements are to expire in 1972, are concerned with the whole broad question both as to the most appropriate role that the federal government might play in higher education in particular, and the nature of the financial arrangements as they might



be divided between the federal and provincial governments; and that indeed they have appointed a committee of their own to explore various alternative positions; and that you are concerned that some group such as ourselves should study the whole thing in a broader context and having some expertise to bear in the matter.

In case there is any unintended inference from your earlier remarks, it is true that the Province of Ontario has already established a commission on post-secondary education, but it is concerned primarily with the prospective structure of the educational process within the province. I assume they are not particularly concerned with financial arrangements.

PROFESSOR SYMONS: Yes, I think this point you put was very helpful. For some reason, apart from the language aspects, in the constitutional discussions people simply have not addressed themselves to the question of education, because it is so complex and because it is so sensitive and perhaps by so much the largest question. All sorts of questions are in the nature of being decided by default or being mis-decided. It really is rather harrowing at times to watch a little of what is going on, and so much of it is going on in different pockets of the constitutional system of the country, with the other pockets being quite oblivious to it.





THE CHAIRMAN: Except for the taxpayer's pocket.

PROFESSOR SYMONS: I think he has a very legitimate right to be concerned. If we leave it as it is, without a few bodies in -- for example, in Ontario this one and the secretariat -- trying to look at it in terms of the national interest, it is going to be decided in terms of the personal interest, interest lobbies (universities being one of the most aggressive) and political interest; and there is no body, federal or provincial, anywhere, which is looking at it and trying to get what would be a good solution for Canada. I am very concerned that we add it on the agenda.

MR. STEVENSON: Mr. Chairman, I wonder if I might say a word or two about the way I see the current situation -- correct me if it is different -- but the current post-secondary agreement relating to fiscal transfers of 50 per cent of the approved operating costs of post-secondary institutions runs out at March 31, 1972. There was an original assumption that during the course of 1971 there would be some very substantial negotiations about the whole form of this agreement, with the idea that quite a new form of agreement would come into effect starting next March. The federal government now though has taken the position, I think in conjunction with the provinces,



that starting next year the agreement basically should be continued for another couple of years; that any changes in it would only be minor. I think the federal government particularly would like to see some lids put on the program, so that it is not entirely open-end.

The way it is now, of course, there is an obligation on the federal part to contribute to the extent of 50 per cent of the costs as they are made, with no federal control, of course, over how they are made. This is very much a part of the original position of the Government of Ontario, in that what we did not want in that field was a shared cost program with conditions and strings attached. What we did want too, and this is about the first time that it has happened in any recent new federal-provincial agreement like that, there is no implicit equilization; it is 50 per cent of actual costs incurred.

There are still a number of areas in the post-secondary field that have not been straightened out. One is the student awards situation which is up for discussion right now in the federal-provincial arena. A number of studies have been undertaken recently on whether or not the present system is the ideal, and this has, of course, quite a financial impact also, so this was to be discussed during the course of 1971.

Another question, I think, that has





created some problems from both ends and the university end is the question of grants from governments for research and other activities where there is a number of governmental institutions at both levels in the field and there is a fair danger of either duplication or grants going in opposite directions, or sometimes grants really having much broader financial implications in that grants for particular research may then require the establishment of capital facilities and additional operating costs to continue the project.

So I think there is no question that in the area of cultural activities and research, if one is talking perhaps about constitutional discussions later, this question of direct aid is something that must come up. It may be just an operating agreement between levels of government that grants and specific aid will be tied in an agreed form so that at least the two levels of government are going the same way.

PROFESSOR McIVOR: I suppose it is correct to say, John, in the tentative agreements that are being formulated for carrying on the broad fiscal arrangements for another couple of years, that most of the discussion is centered on the tidying up of the financial aspects of the whole business.

MR. STEVENSON: Yes, and really as far as we are concerned in the province -- and this may



be to Tom much too narrow a viewpoint -- we have basically considered the agreement of a couple of years ago as not a shared-cost program at all but purely a financial transaction and financial transfer. I think this was the way in which it was presented by both levels of government at the time: it was merely a way through which the federal government financially could contribute to one of the most rapidly increasing areas of government expenditure; and in fact it was to the province just a turning-over of 4 points in the personal income tax and 1 point in the corporate income tax, with an adjusting payment to bring it up to the 50 per cent level.

PROFESSOR McIVOR: There has been nothing in the nature of the present discussions that have taken it in the broader area which you might call educational philosophy and the re-definition of the most appropriate roles that the federal government and province might play in the assumption of primary responsibility for various kinds of education throughout the country.

MR. STEVENSON: No, but presumably it will be an aspect of the distribution of powers discussion.

PROFESSOR McIVOR: I would assume this is one of the primary concerns which Tom has in his mind.

MR. STEVENSON: I think the point I





was making is: is it necessary to tie the potential constitution discussion into the re-negotiations of the financial agreement?

PROFESSOR SYMONS: I think on that, Mr. Chairman, that during the next year or two, there being evidently an agreement between the federal government and the provinces to prolong present arrangements, there is no need to and it is perhaps merciful that there isn't. I think we have had a close call in watching the events of last summer, and a very serious toying with the idea of withdrawal by the federal government, certainly in its innermost circle, and the withdrawal symptoms were clear if one looked at various indicators.

I think we had really better learn from this experience, and not be too complacent about it; and that it is important to just start feeding into the stream of bodies such as this Committee or its successor body, the need for some consideration of this question in a constitutional context and in the philosophical context; because it is much too important to be done just in terms of ad hoc-ery, the working arrangements; and particularly if you find that the provincial end working arrangements are working arrangements, but the federal end they may in fact reflect tentative constitutional, philosophical moves. That was what was shaping up.

I do not think it is out of order to say in the privacy of our meeting that we were told



at the board of the Association of Universities and Colleges of Canada (on which I am doing a tour of duty in the early summer) that Mr. Trudeau had reached a decision that the federal government ought to withdraw. We asked two or three of our members to seek an urgent meeting with the Prime Minister, and it was eight months before the president of the A.U.C.C. was able to have fifteen minutes with the Prime Minister of Canada, and the decision to stop that move was made without consultation with the representatives of the universities, and, I think, without consultation with representatives of the province. It was some inner reaction that led to reversal of the policy. I think the work Dr. Deutch did in the summer was extraordinarily influential, but the provinces do need to work more closely with the post-secondary institutions, not in terms of getting money but in terms of the constitutional implications of research, of science policy, of grants policy, and of the financial and planning of post-secondary matters. They are just not doing it. They are doing it very much as a housekeeping job at the highest level through things like our Committee on University Affairs.

PROFESSOR CREIGHTON: Mr. Chairman, I would like to ask President Symons, partly to clarify my mind, what is, as he sees it, the chief problem; because on the one hand the present





fiscal arrangements appear to be going to be prolonged for two years beyond 1972; and those arrangements, as I understand it, and as has just been explained, mean that the federal government meets 50 per cent of the cost of higher education.

MR. STEVENSON: Operating costs.

PROFESSOR CREIGHTON: Operating costs of higher education in each province. On the one hand you refer to that, but on the other hand you say repeatedly that there has been no general consideration of what I understand to be a national interest in education or higher education and culture in general.

At present the federal government, apart from the grant system, has nothing whatever to say about what is going on through this system of paying 50 per cent of the operating costs. Are you arguing in favour of a federal interest?

PROFESSOR SYMONS: Oh, yes.

PROFESSOR CREIGHTON: But you didn't say that.

PROFESSOR SYMONS: I am sorry, I took it for granted. I would suggest that this thing hung on a knife edge during the summer.

PROFESSOR CREIGHTON: There is no federal interest at the moment apart from the grants.

PROFESSOR SYMONS: Of course, this is pretty big, and if they pull out that federal



interest the implications are great. You know, it is a 50 per cent interest.

MR. DICK: Mr. Chairman, I was going to observe that this goes back to what Don mentioned a little earlier, and perhaps it is a different use of language or something. Whereas we have been looking as far as the fiscal arrangements, whereby the federal government has no legitimate constitutional interest in the direction of post-secondary school education, certainly we will accept their 50 per cent grant without any strings, and we do not want, I presume, past policy to change into a shared-cost program in which there are conditions which will have to be met, etc., and in which control will be exercised.

PROFESSOR CREIGHTON: In other words, the federal government has nothing whatever to say.

MR. DICK: That is right.

PROFESSOR CREIGHTON: In the national interest of higher education in this country.

MR. DICK: That is right.

PROFESSOR McWHINNEY: More than that, Mr. Trudeau is very clearly reflecting the pressures he is getting from Quebec. The Province of Quebec is moving to what is called point-by-point financing at the universities, and it will be introduced July 1973, I think. There will no longer be a blanket grant for universities: it will be given grants for X program or Y program, but





not for Z program. The desire is to prevent competition, duplication and the like, rationalization. There is a tendency for some universities to say: "Well, we will approach the federal power and ask for federal grants without strings attached." Now, there have been hints of it, and, as I understand it, the Province of Quebec has made clear that education is its affair, and the federal government is to keep out of policy.

Mr. Trudeau's attitude seems to be strictly reflecting this, short of special grants for particular scientific or defence projects. Presumably this reflects his response to the Quebec government position, plus the constitutional fact that apart from certain vague notions of using the spending power education is a provincial matter.

What I think you are raising, Tom, would really raise the issue of whether the Province of Ontario has any position on federal relation to educational policy that would differ from the present de facto and in fact constitutional law situation; because there could be a good deal of fighting on this in Quebec, but I am quite sure on a show-down the federal Prime Minister will give way on this point.

PROFESSOR BRADY: The federal Prime Minister of course has had views on this for ten years or more.



PROFESSOR McWHINNEY: Yes, but he wasn't Prime Minister then.

PROFESSOR BRADY: No, he wasn't, but I don't imagine he has altered his position substantially.

PROFESSOR McWHINNEY: Well, you exercise federal powers in some areas and you get a crack-back. The back lash is already starting on the War Measures Act and these other matters, and I would be very surprised if Mr. Trudeau moved into this area of educational policy where he said "We will save McGill; we will give them \$50 million."

PROFESSOR CREIGHTON: I don't see why we should be concerned with what Mr. Trudeau thinks. They are not talking to Ontario. This is an Ontario position, not what Mr. Trudeau is going to do or not going to do.

PROFESSOR McWHINNEY: But what Tom has been raising, this is a straight issue of constitutional power. There is no problem on that.

PROFESSOR CREIGHTON: It is not with Mr. Trudeau.

PROFESSOR McWHINNEY: Then there is not much to discuss if it is just ---

PROFESSOR SYMONS: There is a very big thing to discuss: is education sufficiently in the national interest if the national government finances 50 per cent of it at the post-secondary level? It is as fundamental as that. We came





within an ace of a national decision not to finance from a national source 50 per cent of post-secondary education. No-one would argue, I think, for a minute for a federal decision on policy except the fundamental one of policy: do we want a federal participation in the financing of post-secondary education?

PROFESSOR LEDERMAN: Mr. Chairman, I would like to make a comment or two. If I recall it, the first move of the federal government into the financing of university education at all was about 1950 when the St. Laurent government instituted the direct per capita grants. It was per capita by the population of the province; then it was divided amongst the universities of the province in the proportion to the students they had, and these grants were paid directly from the federal treasury to the institution. They did not go through provinces.

It was at this point that, rightly or wrongly, depending on how you look at it, Mr. Duplessis took exception. I believe the next thing was that the grants at a later stage were changed to this open-ended sharing formula we have been discussing. The Quebec problem at this stage was solved because they took equivalent points.

MR. STEVENSON: So did all provinces.

PROFESSOR LEDERMAN: All provinces did?



MR. STEVENSON: Yes. There was no separate agreement by Quebec under the current arrangements.

PROFESSOR LEDERMAN: Yes, I see.

PROFESSOR McWHINNEY: Because all provinces came into line with the St. Laurent Quebec decision.

MR. STEVENSON: Right.

PROFESSOR LEDERMAN: Anyway, the federal government now does not deal directly with universities, even in these payments, but it is in the field with its research councils. Speaking confidentially. I think the powers in the Association of Universities and Colleges, when the per capita direct payment was stopped, moved in on the federal government and said: "All right, if you are going to stop this, at least get more generous with the Canada Council and the Research Council, and so on, and assist individuals": and the Government of Canada is very much in the business of approving individual or group educational research programs and financing them. So they are very much in the business of higher education in this way.

Also, I am afraid I find myself differing about what I know is a very widespread constitutional assumption that education is exclusively an all-the-way provincial subject. Section 93 starts out with words of limitation:





"In and for each province the provincial legislature has exclusive power over education". Now, are there educational considerations and interests that are more than "in and for each province"? If there are, there is a federal interest under the general power in the constitution. That is just as legitimate an argument there as it is in relation to property and civil rights in the province where it is often made and you don't get a storm about it; but the educational field is so sensitive that those words of limitation, which are even stronger words of limitation than in property and civil rights where it just says "property and civil rights in the province". The limitation in education power is "in and for each province".

So there is a legitimate argument to be made for federal power, a federal interest; and there is nothing to prevent, as far as I know, the federal government establishing and financing completely educational institutions, as it does with military colleges. It could extent that. It is doing very much like that with its Overseas Development Corporation. That is a research enterprise. I think either under the general power under the Royal prerogative they can authorize the granting of degrees.

So there is a lot to discuss here. I realize that the constitutional points I am making



would be very controversial, particularly in Quebec, but as the B.N.A. Act stands the points are there.

PROFESSOR MEISEL: It seems to me this is a question that the Government of Ontario should certainly think about and have a position on, and it should do so in a very broad context. It seems to me, therefore, that it is really one of the roles of this Committee to look at the question and then pass on some document that the new Prime Minister can look at and decide whether really he ought to press the federal government into taking a position in terms of the Canadian interest (the kind of thing Bill Lederman was talking about) which Ontario thinks is desirable from the point of view of the survival of Confederation and its kind of intellectual partnership, if you like.

Anyway, I think that this is something the Committee should look at, and I think what we ought to do today is to decide what the form of our commitment ought to be; whether we ought to look at this as a Committee as a whole, whether we ought to use one of our existing committees, or establish a task force as we have done on some other matters. I think there is something that we must do in response to Tom Symons' suggestion.

Finally, I think it would be very useful if it were possible to put together a fairly concise set of documents, or descriptions, so that we know. I don't think some of us really know





what the history and the implications of all this are, and it would be very useful for the whole Committee to have some background briefing on this so that we can think about it.

PROFESSOR LEDERMAN: There is another area that we have discussed before too, Mr. Chairman. You will recall that job retraining is in issue, and under the responsibility for unemployment insurance and so on I think the federal government at one time were making a sharp distinction between post-secondary education that was continuous from high school into the post-secondary institutions, and the retraining of people who had been out to work for a certain time and then came back to be re-trained for new jobs or better trained for jobs than they had been before. This latter was to be a federal responsibility, and it was artificially, I thought, segregated from the earlier types of group education.

MR. STEVENSON: You may remember, Professor Lederman, when the question of income security and social services was discussed part of the discussion revolved around government services involving direct contact with people.

PROFESSOR LEDERMAN: Yes.

MR. STEVENSON: The federal government was saying that in the social service area this should legitimately be provincial. So immediately, of course, Mr. Bertrand and a couple of other



premiers jumped on this and said: "Fine. What about manpower consultation services and the other areas in manpower re-training where the federal government is charging into fields of education?" It was left in the communique that this particular aspect of manpower services be discussed further. So far it has not been, but we know we have that on the agenda.

PROFESSOR McWHINNEY: I had the impression, Mr. Chairman, that the Rowat-Hurtubise did in part of it get into the constitutional aspects and did so on a comparative basis. What might be useful would be a study comparatively of federal-provincial roles in education in main federal states. Rowat-Hurtubise got into the German situation, which is quite interesting, and a brief history of the Canadian developments.

I would say, in relation to Bill's comment on the constitutional issue, that the federal powers in this area in Canada, in my view, are slight, but this is true in most federal states. There has been a tendency in federal states for the federal governments using the spending power to get into the educational act by attaching conditions, but this always depends on the political facts in that system, and that is the only reason why I raise the issue of the Quebec-Ottawa relationship which Donald (I think quite rightly) suggested one could carry too far;





but as a constitutional issue I would take a rather more conservative view than Bill on this, but it is not actually "tabula rasa". There was a good deal of experience in the United States, Australia, West Germany, Canada. A review of this in the light of Rowat-Hurtubise and a brief history from 1950 onwards might be helpful to the new Premier.

PROFESSOR CREIGHTON: Surely there is another more fundamental reason for us to consider this subject. After all, as Bill Lederman has pointed out, there are a good many ways in which the federal government is actually making contributions in the field of higher education; but in addition everybody seems to curiously forget this, that what this Committee was called in to being to advise was was this provincial government in the prospect of the revision of the constitution of this country, and that is what is going on right now. Are certain clauses of the constitution to be sacred and only certain others to be changed and altered? Is one province to say that the subject of education must not be considered as a possible revision? Is this what we are accepting?

PROFESSOR SYMONS: Mr. Chairman, I hope the discussion may have indicated why we really need to address ourselves to this question. Professor Creighton just a minute ago was asking if I could formulate more clearly what it is I want



to suggest. Really it is what everyone has implied in their comments, and that is that I wish our Committee would look at this. We have spent six years and we have not looked at it. In the last ten months I think we have gone through experiences that make clear how important it is that this province in particular should give orderly thought to it and not just in terms of money and lobbying for the institution concerned, but in terms of the constitutional considerations to the whole discussion we are having.

I really would hope that our Committee and secretariat, drawing a little on some participation from the post-secondary community, would now consider this; and that we would never again be in the position that we might have been in this fall.

When I wrote to ask that this be put on the agenda on 14th September, the federal government had not done its flip-flop yet, and at that point it was still toying with not prolonging the agreements. If they had not prolonged them, we would have been caught, if you will forgive my saying so, unprepared, as the leading English-speaking province, to react in any constitutional context to a withdrawal by the federal government.

I think it is important that we look at the rationale for some measure of federal interest.





Why is there a federal interest? What are its limits? Would we be prepared, as a province, to see this eliminated, as consideration was apparently being given to it last spring and summer, and if not why not? My main concern is just to get it on the agenda.

THE CHAIRMAN: Just on that point, Tom. I think if that situation had come to be, I expect what the Ontario Government's reaction would have been, based on its policy with respect to federal-provincial financial arrangements, would have been to say, "All right, if the federal contribution to Ontario is \$200 million or whatever it is, give us 10 points on the personal income tax, period. We will carry on from there." I think that is the only answer that could be given at that time. Whether that was a good answer or not or a right answer, it would have been certainly within the realm of present policy; but the interesting thing is that, Don, I have been trying to recall during this discussion the issue of the prolongation of the present arrangements and I do not remember anything ever very explicit being said. I think we all just assumed that when the Fiscal Arrangements Act ran out, when the Hospital Insurance Act ran out, when the Health Services Act ran out, and when the Equalization Act ran out in 1972 and other times, that these would be re-negotiated. I have been trying to recall the basis of that



decision. I do not remember this ever being discussed very explicitly in the Finance Ministers' meetings.

MR. STEVENSON: No, it hasn't been, and perhaps I should have prefaced what I said that this is my understanding of the current state of discussions between our Department of University Affairs and Secretary of State's Department and some discussions I have had with the federal Department of Finance people regarding the extension, and it has not been the subject of a formal federal or any public statement.

PROFESSOR LEDERMAN: Mr. Chairman, I would just like to enter a caveat so that what I said earlier won't be misunderstood. I am not advocating any wholesale intervention by the federal government with the provincial control of education. I am not saying that at all. What I am saying is that there is a genuine federal constitutional interest in higher education at least, such that Mr. Trudeau would be wrong to think that he should get out altogether.

THE CHAIRMAN: How do you want to bring this to a conclusion? There has been a suggestion that we form a committee or task force of members of this Committee and our secretariat to deal essentially with this. I think probably, if I read Tom correctly, the financial agreements are the secondary element. The primary element is





the basic philosophical and constitutional question about higher education in Canada as seen from the provincial view and in terms of what policy advice this Committee should render to the Ontario Government on a policy position.

PROFESSOR SYMONS: Yes, that is exactly what I have in mind.

THE CHAIRMAN: With those terms of reference, I would put it to the Committee: would this be your wish to embark in that way? Let us cross that point first. Is there accord with that suggestion.

--- Cries of "Agreed".

THE CHAIRMAN: One's thought immediately leaps to the question of who is to do this and, Tom, you are now on very delicate ground, but aren't you supposed to be on leave at the moment?

PROFESSOR SYMONS: Mr. Chairman, I was not preaching for a call.

PROFESSOR CREIGHTON: That is what you are going to get, I think.

THE CHAIRMAN: In these quarters you never have to preach for a call. There is some little quiet voice always calling. What is your situation at the moment as far as availability of time is concerned, or do you think it would be appropriate in your position to be involved?

PROFESSOR SYMONS: It might perhaps be a handicap in that I am a university president,



but I honestly do not look at it from that point of view.

THE CHAIRMAN: I know.

PROFESSOR SYMONS: I have been simply appalled at the way in which people have been looking at it since there has been a lobby for money instead of worrying about the concept of the country.

PROFESSOR MEISEL: Mr. Chairman, it seems to me Tom is obviously the chap who is most concerned about this and most knowledgeable. I see no conflict of interest at all in the fact that he also happens to be a university president. I think, as a member of this Committee, if he can find the time to chair some kind of task force or something, I think he should do it.

PROFESSOR McIVOR: Far from being a conflict of interest, I would think that the fact that Tom is a university president would strengthen ---

THE CHAIRMAN: The seriousness of it.

PROFESSOR McIVOR: The seriousness and the justification for his assuming such a role.

PROFESSOR LEDERMAN: And aside from everything else, as president he has channels of information and gets soundings.

PROFESSOR McIVOR: Reverberations.

PROFESSOR LEDERMAN: And information.

THE CHAIRMAN: I think we are witnessing the formulation of a draft here.

PROFESSOR SYMONS: Mr. Chairman, I had



no thought of this at all. I am just profoundly concerned.

THE CHAIRMAN: Yes.

PROFESSOR SYMONS: If this would be of help, I would be willing to do it, but I am certainly not looking for things to do, I assure the Committee.

PROFESSOR McWHINNEY: Perhaps Ed Greathed and his staff could do the first part which is largely a descriptive, factual study as to the actual situation of the constitutional power, and I think the comparative material, of which a good deal has already been done by Rowat-Hurtubise, although their interpretation has been criticised by some; I think even a 20-page report would cover most of it.

THE CHAIRMAN: Well, our staff here will give you all their support, Tom. If you would be willing to do this, I would suggest you strike a sub-committee in consultation with me, and we will give you all the back-up you need. I would think this need not be unduly time-consuming in terms of hours here and so on, but the main thing is to get the issues out that you want researched and we will do what we can to help and support it.

PROFESSOR SYMONS: I would be glad to do that if you think it would be helpful.

THE CHAIRMAN: Is that agreeable?

PROFESSOR CREIGHTON: It is worth remarking that the reception of the Rowat-Hurtubise





report in this province was almost uniformly critical from everybody from universities.

THE CHAIRMAN: I think that concludes that item. We will take a short break and then we will begin immediately with the environmental management subject.

--- Short recess.

THE CHAIRMAN: Could we resume on item 5, please. One of the subjects on which the most work has been done and the most discussion has taken place recently is environmental management, and I am going to ask Mr. Thatcher to review briefly the status of the discussions and the status of the work.

Craig, would you mind taking the chair for five minutes. I have to slip upstairs for a few moments.

--- Professor McIvor assumed the chair.

MR. GREATHED: Mr. Chairman (pro tem) our immediate objective in seeking assistance from the Advisory Committee is in connection with the meeting of the Continuing Committee of Officials next week, and ultimately, of course, this will be part of our preparations for the Constitutional Conference next month. Therefore, any help that you can give us this morning on this subject will be much appreciated.

I think when Gary Posen sent you out the note early in January he attached to it both the draft paper on amending procedures, plus the



small note that we had prepared in the Secretariat on the substance and the nub of the federal proposals in this area. I hope this is material that everybody has. Am I correct that everyone has that short note?

MR. PERRY: About three pages?

MR. GREATHED: Three page paper. In addition to that, I might mention two other matters. First, the full federal policy paper is supposed to be in our hands either early next week or be given to us at the meeting itself. This paper will presumably contain a lot of background and arguments leading to the essence of the proposals which are in this three-page note; but we have not seen it yet, so it is not much assistance to us at this particular moment.

I think the other thing that we have received (and I would mention this on a confidential basis at this moment) is a very long study by Mr. McNeil of the federal constitutional group on the whole question of environmental management. It is a very extensive staff study; it runs to some 200 pages. This particular study we have had a chance to take a preliminary look at. My understanding is that it is the basis or is going to serve as the basis for the federal policy paper; and that the McNeil paper itself will probably be published by the federal government shortly after the Constitutional Conference in February.





I think it might be useful for your information at this time, and prior to getting your reactions on this little three-page note that we did, to ask Gary Posen if he would just very briefly give you the gist and tenor of the McNeil paper.

MR. POSEN: I think I might also add that in this morning's Globe & Mail there was an article about a meeting on environmental management in Washington, at which Mr. Davis, the Fisheries Minister, as the minister in charge of the environmental control of the government, was speaking from a paper prepared by Mr. McNeil. It seems to me that the particular study we have received will serve as the basis for most federal pronouncements on environmental management problems in the next little while, including the United Nations conference on human environment being scheduled for ---

MR. GREATHED: 1972 in Stockholm.

MR. POSEN: The paper itself is based very heavily on trend projections worked out for the federal government by the systems research group, I believe at the University of Toronto. The projections are based on what would happen if present government policies remained what they are -- in population projection, transportation projections, housing projection, economic projection of all kinds.

What they add up to is that environmental



problems by the year 2000 will be immensely difficult to cope with, both physically and financially, if governments do not begin to take into account the inter-relatedness of the problems almost immediately.

The tone of the study itself emphasises the need for inter-governmental cooperation in all the areas of environmental management; it emphasises that because they are so overwhelming, no one government can possibly effectively deal with the problems by itself, and the emphasis was that all three levels of government -- municipal, provincial and federal -- would have to cooperate in solving these problems.

The two major areas concentrated on were urban environmental problems and the transcendent resources, the air and water pollution.

What we have seen from the federal government is conclusions they have drawn in the water pollution area. They have not yet put forward their ideas in the rather more complicated area of urban problems.

The tenor, to my analysis of reading the paper, was that they wish paramountcy to come down on the federal side with regard to air and water pollution; but it seemed that it was provincial paramountcy with regard to most of the urban problems. It depends, I guess, how they break down the urban problems -- transportation,



housing, planning, etc.

They recognize in the paper that regional planning or urban planning was the responsibility of the provincial government, and I would assume that this is the kind of statement they would put forward for constitutional discussion in that regard.

Again, it seemed to me that our paper on the machinery of inter-governmental liaison became all the more important in the light of this study; because, once again, it is clear that governments are going to have to cooperate in and coordinate the work in the same direction or they will cancel each other out in these areas.

I was impressed most, I think, by the tone of the paper. It certainly was not a paper claiming or demanding jurisdiction, but based very much on the very immense problems that are going to exist.

MR. GREATHED: The other point I would just like to mention in connection with this, Mr. Chairman, is that, as I said earlier, we have John Thatcher with us this morning, and we would appreciate any comments he has to make on the discussion, particularly because his specific responsibility very much covers this area, and he will be with us next week at the meeting of the Continuing Committee of Officials to advise us on this, particularly on the federal policy paper when





we see that.

MR. STEVENSON: Ed, just one other thing. Have the members of the Committee got the statement that Mr. Robarts gave at the September meeting, because in that there was quite a lengthy note on the preliminary Ontario position.

MR. GREATHED: It was sent to them, but I am sure most of them do not have it with them.

PROFESSOR LEDERMAN: Can you tell us what the principal points were?

MR. GREATHED: Do we have a copy of that, because I suspect that the position which Ontario advances, or the arguments that it advances in February, are going to be drawn largely from his statement in September.

I think basically Mr. Robarts has expressed his satisfaction about how these talks are developing. John, you can correct me here, but I do not think he has expressed, or I do not think your Minister has expressed, any particular concern about the direction of these talks. Do you want to add to that?

MR. THATCHER: If I might, Mr. Chairman, just for the information of the Committee while waiting for the other paper, I think in discussing the environmental and pollution question, you have to keep in mind that this is an emerging awareness; that we do not have a great deal of background information to work from; and in fact many questions



that we are posing now are awaiting technical solutions and really knowledge solutions. We have some knowledge, that these re-apply in other ways, and we need some new knowledge that we don't have now. I think many of these questions are part of a developing process, but there are one or two points I would just add to the review you have had by Mr. Posen.

Going back to the division of powers, a hundred years ago this was an absolutely unknown problem: perhaps you might say it was a non-existent problem. Any activity that has occurred since has occurred on the basis of interpretation of the B.N.A. Act rather than any specific direction given by it.

The provinces, I think, have, again, quite a variation in their approach to this, and it is largely related to their development, to their population and degree of urbanization or industrialization. So there is not by any means a uniform approach to this question from all the provinces.

The federal government, I believe, has been motivated to move in this direction because of an awareness of the problem by the average citizen, and the need to ensure that there is a federal role in order that the federal government may respond to concern expressed by the population.

The provinces that have been active





generally have moved into this from, first of all, a delegation of many of these concerns to a municipal level, followed by the taking back of the responsibility so that more definite action could be focussed on the problem by the provincial authorities during the last few years.

The federal approach so far has caused some concern in those provinces which have already commenced action in the environmental field; while at the same time I think that the provincial workers in the field are looking for a federal role but they want to be sure what this role is. There has been a tendency to suspect that the action so far and the arguments advanced by the federal authorities are tending towards a supervision of the provinces in this field by the federal government. I think there is perhaps some fear that that might actually happen.

This is based on arguments such as the one that where pollution occurs in one province and it affects persons in another province, that the federal government automatically has responsibility: not that the federal government is responsible for ensuring that the provinces work out the problems, but rather that the federal government work out the problems.

There is no question, I do not think, of the federal role in international matters, and this chiefly concerns only one other nation, of course,



but it is a very significant part of this whole environmental question.

Ontario has certainly done all that it can to assist the federal government in representing Ontario in its dealings with the United States.

There may be some need for the federal government to assume a degree of responsibility in matters that are of a social nature, that relate to pollution control. As I have said, the environmental question ties in very closely with the manner in which people live, the numbers, density, the degree of services that they require in many sociological questions that are not being dealt with to any exact extent at the present time. As our awareness of needs in this subject develops I think there may be a more significant role for the federal government in that aspect of it.

We have had discussions between the provinces and the federal authorities in, specifically, water management and in some more general areas in the field of research; and we have talked about having federal funds allocated to research projects which would be used to support provincial abatement programs. This has not been altogether successful, I think partly because the people handling the programs at the federal level tend to be interested in certain matters that may not be the needs of the other provincial officials who are requiring research



directed towards the solution of certain operating problems that they have.

I think, Mr. Chairman, those opening remarks to help put it in the frame that we see it in the province, would be helpful.

THE CHAIRMAN: (Prof. McIvor): Thank you.

MR. GREATHED: Mr. Chairman, I might just say that I think in connection with the discussions next week it would probably be most helpful to us if the Committee can go through this short three-page note, which reflects, as I say, the essence of the federal proposals that we have been given today, and also the discussion that took place at the meetings.

So I think, with your leave, if any members of the Committee have any particular comments to make on this, I think this would be particularly helpful; because the concentration next week, I think it is fair to say, will be on air and water pollution and I think it will also be centering around the question of concurrency and paramountcy.

THE CHAIRMAN: I suggest it might be useful if you just take us through this note point by point and invite any comments or reactions from the Committee.

PROFESSOR McWHINNEY: Did you get, by the way, any specific citation of problems? I





mean, in a way, one is discussing an abstract issue, that Canada is not Europe, of course. with a concentration of countries all together. Were you given any specific examples of air pollution from one province to another, documented example, or one-sided, or the water other than the Great Lakes, which of course is a federal issue, and the St. Lawrence and the sea, which is again a federal issue?

MR. STEVENSON: If you go outside the constitutional meeting in Ottawa and smell the sulphur fumes from Eddy's paper pile across the river, you can see it pretty easily.

PROFESSOR McWHINNEY: Eddy's can be solved, of course, by the federal capital territory concepts.

PROFESSOR LEDERMAN: There is the mercury business, of course; mercury going into the Saskatchewan River in Saskatchewan and it stopping fishing in Manitoba. There are court actions on that right now.

PROFESSOR McWHINNEY: There is some sort of listing then of specific problems, as there is in the European context.

PROFESSOR LEDERMAN: I don't know whether there is any listing, but that instance has been in the newspapers; that is all I am saying.

THE CHAIRMAN (Prof. McIvor): Ed, would



you just like to give us a rundown on this?

MR. GREATHED: I think I draw the Committee's attention first particularly to the second paragraph on the first page of this three-page note, namely the essence of the Government of Canada's position. I would simply appreciate the Committee's comments on that paragraph, as to whether they think that sounds like a reasonable proposition.

PROFESSOR McWHINNEY: It is a proposal for a new head of substantive power.

MR. GREATHED: That is right.

PROFESSOR McWHINNEY: In fact, in the pollution of the sea the federal government has full powers there by virtue of looking not at the pollution as a head of power but heads of power concerning the sea or concerning foreign affairs if a treaty or something of this same sort is involved.

I suppose you really have to consider the sort of problem that is concretely being discussed in the United States. This crucially affects, for example, whatever powers relate to encouragement of financial investment or establishing industry in a particular area. The Tarrytown problem which was discussed in New York last week is crucial. Union Carbide, threatened with prosecution for polluting the Hudson, say: 'We will move out of New York State.'





I suppose the issue here is whether the federal government could not achieve whatever common national purposes it feels are necessary by pulling together other existing heads of power. I think this is a very basic issue, because quite obviously the effect on provincial control or provincial interest in encouraging factories to come in, new industries, is going to be a very considerable one.

Has the federal government stated categorically that it does not think by piecing together these existing powers it can reach pollution control as an aspect or as an incident?

MR. GREATHED: No, it has not, and this is the difficulty. We have what we think is the tail-end of the federal paper which we hope to get next week, but so far all we have are these very specific proposals. I suspect, although I have no reason to believe that there is going to be any major change on this, that what the Constitutional Conference will be asked next month is at least to discuss (1) whether there should be this new and specific head and, secondly, whether the paramountcy provisions are ones that strike the conference as being reasonable. I think these are the two questions that will be before them, and it is on these that we are really seeking the Advisory Committee's comments.

PROFESSOR McWHINNEY: If the Canadian



federal controls are very, very severe, of course, it is going to be a factor in the decision by American companies whether to start concerns here or keep them in the United States. So there is an obvious provincial interest affecting the provincial interest in encouraging investment in the province. So I suppose the fundamental issue is: do you really need an independent head of power? The answer to that turns really on an examination of whether the incidence of existing heads of power are not sufficient to supply whatever control measures the federal government thinks essential directed towards pollution. I suspect that really they have to spell this out a little bit for the province to give a more sophisticated answer.

PROFESSOR SYMONS: Mr. Chairman, there must be other laymen too who attend the forthcoming conference. Is it correct that you have not yet got the fuller paper from the federal authorities?

MR. GREATHED: That is right.

PROFESSOR SYMONS: The question seems so complex. Are you going to have any more time than a matter of a few days to see what they will want to do?

MR. GREATHED: Not likely, but that is nothing new, of course. Moreover, I think, apart from any preliminary discussion we will have in the Continuing Committee of Officials next week, we



will also have approximately two weeks after that to consider it at home. So that it is not a lot of time, but I think the federal government understandably (and in fairness to them) has been somewhat preoccupied with other matters this fall, and I think they got tied up rather badly on their agenda.

PROFESSOR McWHINNEY: May I make one last general comment. The thing that worries me here, speaking as a lawyer, is that there are fads in law schools -- international law after World War II, then air space law. Then you went on to poverty law, and now it is pollution. It may be there is a popularity wave. It is a good thing now, and obviously there is a public need, but I am sorry to escalate into a head of power if the same results can be achieved by piecing together other powers.

I think Tom's point is rather important. I hope you do not go into this thing cold with no more documentation than this and agree that since sin is bad, this should be a general power. It is not necessary, and it has effects on other powers that are clearly provincial, either in the strict sense or provincial through the municipal authority sense. This effect on industrial development is clear. There is a very complex process of balancing of interests. The province may well decide that it will take more time over





pollution control measures as a method of not discouraging industrial development in the province.

MR. GREATHED: I would only make two comments in response to that, Ted. First, I do not think these questions are a fad in the minds of the politicians who are preoccupied with them; secondly, the officials are not going to agree to anything next week, but they are going to have a preliminary discussion. They are going to seek clarification of any points that are in the federal paper. Then I think we bring home this clarification and this explanation to the Prime Minister, and on that basis have a discussion and some decision as to what sort of view Ontario might take at the Constitutional Conference.

PROFESSOR LEDERMAN: Mr. Chairman, I share these misgivings about the sweeping character of the word "pollution". I think what you mentioned earlier was that with anything this sweeping it is a classical area for cooperative federalism.

If you are going to write a special power in using the word, then it has to be concurrent all right, just because the thing is so sweeping. Then you have to deal with the paramountcy issue and they have a proposal here about how to deal with the paramountcy issue; but there is a prior question, as Ted has indicated. Are you going to cut across existing categories



of power with a sweeping category of pollution even on a concurrency basis? I am not satisfied that one is wise to do that at this point, but even if you do then you have got to face the paramountcy problem: that is, in the event of a conflict between federal and provincial legislation on this subject, which is to prevail?

I notice the test here is:

"Provincial powers would be paramount  
 "in relation to the control of pollution  
 "which originates and only has  
 "significant effects within the province.  
 "Federal powers would be paramount in  
 "relation to the control of pollution  
 "which has significant international  
 "or inter-provincial effects"

That makes paramountcy depend on certain findings of fact and certain scientific assessments and certain monetary assessments, and so on. Maybe that is workable (I don't know) but I think it is something new in a basis for switching paramountcy one way or the other.

The other basic issue that arises, and one of the troubles with concurrent powers is: who is going to admit to responsibility? If there is an exclusive power, there is no doubt about who has responsibility to do unpopular as well as popular things; but if you have concurrent powers, there is a great tendency, with unpopular





legislation, for one government A to say, "B has the power. Let B do it". They usually try to pass the buck. On the other hand, if it is popular legislation, they will each try to rush in and get there first, occupy the field.

I am in favour of some very particular judicially developed concurrency which eases the situation and gives them flexibility in particular areas; but I have misgivings about taking such a sweeping thing as pollution, environmental management, and even making a concurrent power out of it. I think this is a classic area where you have to use the techniques of cooperative federalism on the basis of existing powers.

For instance, the federal government and Mr. Davis have published a paper on this which was in the Globe two or three years ago. The most sensitive living thing to pollution in the water is a fish (so he claims) and when the fish start to die you know you have got pollution. Fisheries is an exclusive federal subject, so to protect the fish they can go after water quality. They have exclusive power there, and, as you pointed out here, there is also a concurrent agricultural power with federal paramountcy, so they can go after the use of fertilizer there.

I am inclined to agree with Ted that it is far better to see what cooperative federalism on the existing powers will do, what



you can do that way, before you start writing in these sweeping new headings.

MR. DICK: Mr. Chairman, just so that the Committee may be shocked, I will express my entire agreement with what both Mr. McWhinney and Mr. Lederman have said, and rest on carrying their bags for them. We have three lawyers in agreement, and you don't get that very often. (Laughter)

PROFESSOR MEISEL: Highly suspicious.

MR. GREATHED: The operative word is "lawyers".

MR. PERRY: This is an alarm signal if I ever heard one.

PROFESSOR McWHINNEY: Just after that, I hate to say it, but it is so popular now to get into the act, it has a high political favour. I am not suggesting that officials who put this up respond to these fads, but I would be very sorry to see, simply because something is "with it", so to speak now we make a sweeping new constitutional change before the ordinary process of demonstrating on an empirical basis that existing constitutional powers cannot solve the social problem.

MR. GREATHED: Just to allay your fears, Ted, as you so well know, in two and a half years of discussion on the constitution we have made no sweeping changes at all. (Laughter) I think the point here is simply that we will discuss this subject, the First Ministers will discuss the



subject, and they will leave it, as they did the spending power, at what consensus they can find. At some point in the future we hope they will be able to come back with perhaps an amending formula and so on and be able to put forward a package of propositions, but I think we are in a very preliminary stage here, and that there is not going to be firm agreement on any of these specific proposals. I think they just want to discuss them and see if they make sense and, when the whole review is completed, to see if those parts they have discussed can be translated into constitutional things.

MR. STEVENSON: Although there has been a suggestion from both sides, from what I have heard. that in this area of environmental management, particularly pollution, there are more grounds for thinking there might be an agreement at the top than in most others.

PROFESSOR McWHINNEY: Because the power is basically provincial as the thing stands and the federal government, if it wants agreement to cooperate, so do the provinces if they want to solve the problem.

PROFESSOR MEISEL: At the risk of being overwhelmed by the unanimity of lawyers, I think I should quickly step in as a political scientist.

THE CHAIRMAN (Prof. McIvor): If that helps. (Laughter)





PROFESSOR MEISEL: It is more pollution, really. I think that the legal argument that has been presented to the laymen is very convincing, but I think there are other aspects of this which one ought to keep in mind. One of them Don just mentioned. I think if there is a possibility of working out a successful agreement in an area without penalties, without costs, I think that is worth doing in Canada now. Quite aside from the fact that it is desperately needed or not, I think just the process of the government achieving something of a success in an area like this would be politically, in the terms of the political sociology of it, very useful.

The other side of it is that it is true that pollution is now a fad, but if one looks around oneself and sniffs and breathes one realizes why. I think it is a crisis, and, from everything that one reads, it is a crisis that is not going to get better unless something is done about it.

Therefore it seems to me that if the fact that this becomes a subject of constitutional debate and that governments assign responsibilities, this creates another impetus for the solution or attempts at the solution, and then it is probably again worth doing, although perhaps the same thing could be achieved without a constitutional change, so as an incentive, as a carrot, it may be useful



to discuss it at this level and even to make agreements and change the constitution.

PROFESSOR LEDERMAN: Mr. Chairman, I don't think any of the lawyers are disagreeing with Professor Meisel. What is on the paper here is a technical, constitutional point, and we were addressing ourselves to that.

Secondly, no-one denies that pollution is the right word to describe a very great and growing modern problem. Of course, let us have the governments discuss it, and if they can agree, hallelujah, but agreement within the current and conventional framework of cooperative federalism and the inter-governmental agreement; because some kind of inter-governmental agreement you have to have anyway, even if you make the powers concurrent.

PROFESSOR MEISEL: Yes.

PROFESSOR LEDERMAN: You have got to agree who is going to use what powers still in what respect.

PROFESSOR MEISEL: What I was trying to say is that if the constitutional change were to be made and this were to provide the additional incentive for the governments to do something about the problem, then if that constitutional change can be made without costs it is probably worth doing, even though I recognize the fact that the kind of cooperative federalism solution would probably lead to the same result in terms of dealing





with environmental management.

PROFESSOR LEDERMAN: All I am saying is that you do not escape the need for particular inter-governmental agreements even if you do make it concurrent, because you have to agree how you are going to use concurrent powers, the way we have to agree in the financial realm about the use of the concurrent taxing powers.

PROFESSOR BRADY: If I may interject in relation to what was said, perhaps an order of priorities is worth looking at. I would think that concentration by federal and provincial authorities on developing the agency to make a cooperative approach to the whole problem should help priorities, over trying to define some power to add to the constitution. In other words, the agency -- bring it into being and so on -- may better then perhaps be able to define what powers should be added to the constitution.

The primary thing, surely, is to get the several authorities in the position where they can concentrate their thinking on what ought to be done to make for effective cooperation in coping with problems of pollution in almost any area. Actually, up to the present there have been some gestures towards that, but you can hardly say there is an adequate agency to accomplish the same. The vehicle, in other words, is not yet adequately devised to achieve what would seem to be, in the



interests of the whole nation and the provinces,  
a desirable end.

PROFESSOR SYMONS: Mr. Chairman, I want  
to raise a layman's question. I am sorry, I had  
to leave the room for a minute, and it may have  
come up.

Under item 2, I gather that the proposal  
is to leave simply the difficult business of  
definition to court work subsequent. Is this a  
good approach, an adequate approach?

THE CHAIRMAN (Prof. McIvor): As a  
matter of fact the point did come up during your  
absence, Tom. Bill raised the point that it may  
be good or bad, but it introduces an entirely  
new concept into the determination of paramountcy.

PROFESSOR SYMONS: I am relieved to  
hear that. As a layman it struck me that way,  
and this is so, eh?

PROFESSOR CREIGHTON: It is certainly  
the fact.

PROFESSOR LEDERMAN: Mind you,  
paramountcy will not cause an issue unless both  
authorities with concurrent power enact conflicting  
statutes. Then you get into all kinds of  
difficult problems about what amounts to conflict,  
what amounts to inconsistency.

I think that kind of problem has to go  
to the courts. I do not see any other institutional  
way of dealing with it except by adjudication. It



is not inevitable, from the system of concurrent power, that you would get these problems. In fact, that is precisely why I say that even with concurrent powers, if the governments agree -- they might agree about agricultural power now, that the province looks after the local waterways but the federal government looks after fertilizer. If they agree and don't both enact inconsistent regulations about fertilizers, then no concurrent powers are being used and you do not get any paramountcy problem.

PROFESSOR McWHINNEY: Bill made this point, Tom, that I think you picked up as a layman: this term "significant" is what Judge Jerome Frank used to call a weazel word -- it is incapable of precise meaning unless you get into difficult factual, scientific tests which Mr. Justice Brandeis favoured but which our Supreme Courts never really applied. They would really have a holiday there.

I would suspect the correct approach though is in terms of what Alex Brady was saying. I think one should really say one needs to define the ambit of the social problem precisely; then try to refine from that what control measures are necessary; then examine the existing constitution to see whether or to what extent the constitutional powers as now provided, with the other crude bridge of cooperative federalism, do





or do not meet the problem.

I think the wrong approach is the a priori definition of a new constitutional power before the ambit of the problem has been properly defined, and the community control measures necessary have been spelled out. I think we should really ask the federal people to do this. It may well turn out that, as I suspect, the thing is perfectly adequately covered by existing constitutional powers, with the added element of cooperative federalism that this province has been stressing. It may be beyond that, as John Meisel suggests, that you may, just as symbolic value to excite public opinion, want to escalate into a new head of constitutional power; but in legal terms it is the wrong approach to start with a new constitutional power before you have defined the ambit of the problem and the control measures necessary, and then look up the existing constitutional powers and see whether or not they fail to meet the situation.

I think really that was the point that Bill, Rendell and I were making, and I think it is significant that Tom coming in immediately focuses on Judge Jerome Frank's weazel word here. There will be a holiday for the courts if they get into that.

MR. GREATHED: This was, of course, Mr. Chairman, the problem that was exhaustively



discussed at the last O.A.C.C. meeting.

PROFESSOR LEDERMAN: Mr. Chairman, I am halfway through having made the other main point I want to make here, and perhaps you will bear with me for another couple of minutes.

THE CHAIRMAN (Prof. McIvor): By all means.

PROFESSOR LEDERMAN: I make the further point about item 6 on page 2:

"It was suggested that the doctrine of  
"paramountcy could be interpreted to  
"mean that where different national  
"and provincial standards were  
"established, the higher standards  
"would prevail, unless an industry  
"was specifically exempted from the  
"operation of the higher standards."

MR. DICK: I like that.

PROFESSOR LEDERMAN: This is the conflict problem I am talking about that you get into if you want to run along with concurrency. The difficulty here is -- and Mr. Thatcher would know better than I do about this -- that a set of regulations establishing anti-pollution standards is going to be a very complex thing. I envisage something as complex as the food and drug regulations.

MR. THATCHER: At least.

PROFESSOR LEDERMAN: I do not think that





is unrealistic.

MR. THATCHER: No, it is not unrealistic.

PROFESSOR LEDERMAN: To take a provincial 50 pages of regulations and compare them with a federal 50 page set of regulations and try to assess the consistency and inconsistency and which is higher and which is lower: you will find some provincial standards higher and some of the federal standards higher and vice versa through the piece, and indeed in some cases the standards will simply be different and it will not be a question of higher or lower but they will just be different.

Mind you, there is a useful area for concurrency, but if you open up this kind of comparison between federal and provincial statutes over a wide area, you are opening up this whole question of comparing statutes in detail for conflict. I suppose, as a lawyer, we should not complain, but we would have to double the size of the judiciary in this country.

PROFESSOR McWHINNEY: The cases themselves might take a year or two to decide.

PROFESSOR LEDERMAN: Yes, there would be delays. Even now, in the classic case on the subject -- 1896, the local prohibition case -- Lord Watson compared the provincial total abstinence scheme on a local option basis with the federal total abstinence scheme on a local option basis. They called it "temperance"; I would call it total



abstinence, which is more accurate. (Laughter)

He said: "These are both total abstinence schemes on a local option voting basis. There is enough difference between them that they cannot stand together and you have to take one or the other." So there is authority for the difficulty.

THE CHAIRMAN (Prof. McIvor): There are degrees of total abstinence (laughter) from the lawyer's point of view.

PROFESSOR LEDERMAN: I don't think you can get any lawyer or judge enthusiastic over total abstinence at the times that they have to argue for those who were -- the difficulties that one is opening up here, there are some areas in which it may be worth while to face up to them, but the problems are rather frightening.

The other difficulty is that you can say that responsibility for action goes with exclusive power, but can you say that it goes with paramountcy when the other fellow has power to act too? You get a diffusion of responsibility or an opportunity for evasion of responsibility that could be very bad. That is all I have to say.

THE CHAIRMAN (Prof. McIvor): I think the nature of the discussion has brought out very clearly the underlying basic issue presented by paragraph 2 which you had originally directed to our attention, Ed. Perhaps having got the unanimous agreement of the lawyers and the



political scientists, we had better quit while we are ahead at that particular stage. In any event, Bill's subsequent remarks have brought us on to particular points, and I am wondering if you would like to direct our attention elsewhere.

MR. GREATHED: Mr. Chairman, I think the particular points are a précis of the discussion which took place, and I hope they are accurate. If Mr. Dick has any caveat about them, I hope he will express it, but I think those were the major points that were raised at that discussion at the C.C.O. meeting.

I think as we have discussed points 1 and 2 and to a certain extent point 6, we could start just with point 3 and go to 3, 4, 5 and the other points on page 3.

PROFESSOR McWHINNEY: Could I ask you, if it is not a breach of confidence in the C.C.O., whether the views expressed were expressed by any other province than Ontario?

MR. POSEN: These views represent general discussion rather than our own questions.

PROFESSOR McWHINNEY: Did any one province have any sophisticated thinking on this, or at the most was it just a new problem?

MR. POSEN: I think it reflected the concern of each province very differently. British Columbia and Nova Scotia, having ocean boundaries, were very concerned.





PROFESSOR McWHINNEY: With ocean pollution, which is a federal issue.

MR. POSEN: Yes, and even with sewage going, say, from Victoria into the ocean -- has that significant international effect?

PROFESSOR McWHINNEY: Does the United States do that?

MR. POSEN: Yes.

MR. DICK: I think, to answer Ted's question specifically, there was a feeling in almost every province along the same line as has been expressed here, that is, to say we require a new power in the constitution of this nature raises problems that we have not even yet conceived of in our discussions; particularly in the intrusion or the imposition of a federal paramountcy in areas which could have tremendous effect upon, say, the development of a province, its industrial capacity and its economy. So there was this concern in it generally.

MR. POSEN: I think we should also add there was some concern from provinces which have suffered pollution originating in other provinces, that the federal government have some control.

PROFESSOR McWHINNEY: But the point Rendell makes, presumably, was reflected in the viewpoint of industrial provinces -- Ontario, Quebec, and probably British Columbia, that is,



the balancing of interest between environmental protection and the encouragement of industrial investments was reflected by, say, two, three or four provinces.

PROFESSOR LEDERMAN: The federal government has enormous power now in this field under various headings, which gives them bargaining power for cooperative federalism. That is my point.

PROFESSOR McWHINNEY: There is no question of its power in relation to ocean, marine pollution. I gave an opinion three years ago on this thing. I do not think there is any issue here, and this is why I wonder, on a point-by-point basis, if it may not be found that most of the problems can be solved already.

MR. POSEN: The caveat that is in my mind is that the Canada Water Act is probably a good example of cooperative federalism at work; at the same time the constitutionality of the Canada Water Act has theoretically been called into question, and at the back of my mind is the fact that if it ever got to court and the court were to agree with the constitutionality of the Canada Water Act and to base it on the "peace, order and good government" clause, whether that would not have a greater deleterious effect on provincial powers or would represent such a tremendous increase in federal powers.





MR. THATCHER: Mr. Chairman, I do not think it can be emphasized too much that environmental management and pollution danger are secondary effects of almost all of man's activities, and I think it is essential that this be in the backs of our minds; and that if special powers are to be built into the constitution to decide this, the ramifications are immense and we cannot deal with this lightly.

I mentioned earlier that this is a developing awareness and the scientific back-up is slowly coming along, but we have not all the information that we can have within a few years. I believe we have to try to find a developing solution rather than an immediate solution to this question.

In the meantime, I believe that there is room within the existing constitution for both levels of government to play an active role in this and to encourage the development of scientific solutions to these problems.

The federal government perhaps has the most difficult one. Some of its arguments have looked a little specious. For instance, they have said that because they have, as I think Mr. Lederman mentioned, a responsibility for fisheries and fish are more sensitive to pollution than people; therefore all the pollution standards have to be based on the most sensitive form of



fish and the fish are more important than people.  
It becomes rather ridiculous.

It is equally ridiculous to take the view, as they have, that the federal role in water transport, in navigation, gives it a role in this; because I have never seen anybody who suggests really that it is more difficult to float a boat on dirty water than clean water.

So they have had some difficulty in maintaining some response to public demand; but I believe that with cooperation and willingness to work within the present constitution, and being aware that our understanding of the problem is developing and that there will be an opportunity to review this at some later point, we should be simply slow in trying to find a one-shot solution to this problem.

PROFESSOR MEISEL: There is an aspect here that is somewhat similar to the thing that Tom Symons mentioned about education, in a way. Is there a threat to the kind of national standard in this, in that some provinces may be more rapacious than others and therefore willing to make agreements with industries that would lead to pollution that then offends neighbouring provinces or the future?

PROFESSOR CREIGHTON: Precisely as indicated, sure.

PROFESSOR McWHINNEY: There is no question



in the United States that the severe New York standards and the greater -- what would one call it? -- involvement of the Federal Justice officials in the plights of New York and the Hudson River is having already an adverse effect on expansion in New York State. So you get this issue of balancing interests in environmental management versus investment. It could arise in Canada that an industrially under-developed province -- conceivably Prince Edward Island -- might be prepared not to have controls and to encourage investment, or Quebec, for example, which wants investment more badly than any other.

PROFESSOR MEISEL: If that is the case, can we do something about it within the present ---

PROFESSOR McWHINNEY: I think the point Bill was making in stressing cooperative federalism was the facultative approach using existing powers by voluntary acceptance of common standards. If that fails, then you may have to escalate into the issue of paramountcy, but do not approach paramountcy and the new federal power as an a priori step in advance.

PROFESSOR MEISEL: Yes, but it seems to me that if, say, Ontario and the federal government are good boys and they want to do something they can within the existing arrangement, they can do nothing to prevent Quebec, say, or Alberta or whoever going ahead and doing things which would





impair some kind of Canadian standard, if you like.

PROFESSOR McWHINNEY: If they are purely intra-provincial and Quebec does it, I assume that is one of the interests that the Quebec voters have at their regular elections, if they are purely intra-provincial. If they are inter-provincial, I would suggest the existing powers would cover the situation.

PROFESSOR LEDERMAN: Mr. Chairman, there is something here quite inseparable from federalism. As long as you have a federal constitution, this kind of problem of differential is going to be with you. It is with us now in the tax field, and we are not proposing to re-write the tax powers because it is possible for the Quebec Government to give greater tax concessions to industry in the realm of provincial taxation than the Ontario Government is willing to give.

The whole burden of taxation, the whole burden of social services, anything you want to name, can cause these differentials, not just the cost of pollution abatement. Pollution abatement, too, yes, but again, if you want a federal constitution there is no escape from this kind of thing.

PROFESSOR McWHINNEY: Even in housing, bad housing of the old and the grandeur of the Expo's, that is (I think Bill is right) one of the surely community choices than any province may properly make, so long as it is concentrated



intra-provincially.

PROFESSOR MEISEL: Yes, but if the consequences affect the rest of the neighbouring provinces ---

PROFESSOR McWHINNEY: Then you do get into existing constitutional powers, in my view, the possibility of control.

PROFESSOR LEDERMAN: But federalism exists to prevent differentials between internal areas to some extent; but to other extents you do not want differentials, you want common standards, and you are always at the game of balancing these two things.

I agree it would be a bad thing if Quebec had much lower pollution abatement standards and much less costly standards for industry than we had in Ontario, but I do not see the solution in these three pages, that is all.

PROFESSOR CREIGHTON: You were saying earlier that so far as water is concerned the federal government is already empowered to do all that is necessary in all probability. Through what ---

PROFESSOR LEDERMAN: It has a great deal of power because of the fisheries power.

PROFESSOR CREIGHTON: But what about the criticism of the Water Act, because it is implied that its validity might be doubtful? Do you know why?





MR. DICK: May I interject at this time? On the original bill that introduced the Canada Water Act, we had many expressed concerns about the constitutional validity of some of the provisions of the Act and the manner in which it is going. Then as a result of the meetings we had in Ottawa many of our objections were modified or erased completely.

I am not sure, John, how you feel, but at the present time I am not sure that the Canada Water Act, as it stands, is not an effective piece of legislation giving the federal government a participation within its constitutional field but leaving the provinces in a better position.

MR. THATCHER: I think it is probably constitutional inasmuch as its main provisions require that the provinces be involved in going into it on a partnership basis and entirely voluntarily.

There is a provision for the federal government to override the provinces if the provinces do not act, and I am not sure that that will stand up if it is challenged. It may or may not be.

The degree to which it will be used is very uncertain. There has been no money budgeted to do anything whatever really under that statute so far, and the definition of what constitutes national interest has been left in abeyance. So



that they have a statute which it is substantially, I think, within the powers of the federal government to enact, with the exception of one provision, but the degree to which it will be used and the involvement of Canada in water management remains uncertain. At the present time Canada is not very much involved in water management as a resource from coast to coast.

PROFESSOR CONWAY: Mr. Chairman, I would like to ask Mr. Thatcher if there is any agency either at the federal or provincial level which is actually collecting data on this matter.

MR. THATCHER: Yes, indeed. The federal government has established the Canada Centre for Inland Waters at Burlington and had staffed it with a considerable number of scientists, and doing a great deal of direct research in this way. It also has its fisheries research people who are doing a lot of work, and it is funding research at the universities, and I think it is playing a very significant role in data-gathering; but it is a problem of tremendous dimensions, and a great deal of the information that all the people in this field are getting is coming in through, you might say, international sources. We are getting a great deal from the United States and Europe in addition to what is being done in our own country.

PROFESSOR CONWAY: What about other forms of pollution like the Eddy Match plant or



down here at the end of the lake?

MR. THATCHER: The federal minister, Mr. Davis, has indicated recently that he does propose to introduce a clean-air bill, and that there will be some federal involvement in air pollution. We have a meeting scheduled for about the end of this month, and so far we have very little information concerning his intentions. I presume that it is similar in nature to the Canada Water Act, but I have no details yet. However, there is some involvement of the federal government being envisaged in this.

There are some considerable difficulties, and the one you mentioned of smell is a good example, because we have no instruments for measuring smell. When I say "we" I mean the human race has no instrument for measuring smell -- other than noses, and noses do not always report the same findings. So that in trying to deal with what constitutes smell and some other air pollution problems, we have some difficulty there.

PROFESSOR CONWAY: And the automobile exhaust which is so important in the smog element.

MR. THATCHER: There is no particular technical difficulty with automobile exhaust. I think it is more a systems management difficulty. We cannot entirely eliminate carbon monoxide from the internal combustion engine, so the question of whether we continue with the internal combustion





engine is really what is involved in that question, and we have relied on it so heavily to the present time that it undoubtedly would take some time to come up with a solution to that.

PROFESSOR CONWAY: I saw in the New York Times yesterday the story that the break-through had actually been made.

PROFESSOR McWHINNEY: The break-through has been made with jet aircraft. If you notice, the big aircraft, the airport at Chicago now has faculty provisions and the new jets, the 707's and 747's now have filters applied and it is quite noticeable that there is no exhaust on take-off or landing.

MR. THATCHER: Visible.

PROFESSOR McWHINNEY: No observable, no visible. I hope that eliminates 90 per cent. Does it not?

MR. THATCHER: Not really.

PROFESSOR McWHINNEY: How much does it? Does it take the colour out?

MR. THATCHER: Visible is the carbon in the carbon state, and you can eliminate that, but there are copious quantities of carbon monoxide being discharged, carbon monoxide being an invisible, tasteless, odourless gas.

PROFESSOR McWHINNEY: So all it does is take off the colour.

MR. THATCHER: That is right.



PROFESSOR McWHINNEY: It is psychological.

MR. THATCHER: That is right.

MR. GREATHED: You know where the yellow went.

MR. THATCHER: We have done testing at the airports with the federal people on the jet aircraft emissions, and the speed of the jet and the height at which the emissions take place and the quantity, are such that they are almost undetectable at the ground.

This is one of the features of air pollution, that with the natural dispersion of gases and the very gradual fall-out of finely suspended particles, nothing stays up in the atmosphere very long; but we are only dealing with a certain period of time following the emission. Otherwise we would not be able to breathe, because every volcano and every forest fire would fill the atmosphere with pollution.

PROFESSOR McWHINNEY: This new federal office that Robert Shaw is going to head, will presumably pool all federal aspects of environmental control, will it not, or who is handling it now? Is it the Privy Council Office or Fisheries, or what?

PROFESSOR LEDERMAN: You are suggesting they have a new department.

MR. THATCHER: New department, and the statute provides for that department to assume





all responsibility in matters for which Parliament is responsible, excluding, as I recall it, any matters which have been given to another department by statute.

This subject is very difficult to extract from other of both man's activities and government's activities, and in fact I don't know that it can be, so that there is always this overlap question.

Did I answer your last question, sir?

PROFESSOR LEDERMAN: I think both Dr. Brady's point and Mr. Thatcher's point are crucial here -- the research element. Until we know more, one has to move cautiously about powers, and it is no use trying to do things about powers now that we might be prepared to deal with when we know ten times as much, in the scientific sense, about pollutants. One of the most important things that government can do at this stage is to fund research and plan research.

PROFESSOR MEISEL: Which level of government?

PROFESSOR LEDERMAN: Governments, both levels, by agreement.

MR. STEVENSON: Mr. Chairman, I think there is a fair degree of consensus around the table on the problems of federal approach or any situation of putting a separate head in the constitution; but, just hypothetically, if you did have a head, is there any word that you know of that



is less weazly than "significant"? This is going to come up. It is coming up in the federal proposals on capital markets and a whole series of areas, where their approach is: "If there are significant inter-provincial facts or mixed facts, the federal government has perhaps paramountcy in a concurrent field."

PROFESSOR McWHINNEY: I know of no more weazly word than "environmental control" frankly. It worries me to see a blanket power postulated a priori. I think every exercise in the refinement of it is a little superfluous unless one accepts the notion of such a power with paramountcy attached.

PROFESSOR BRADY: "Environment" is everything.

PROFESSOR McWHINNEY: Environment is everything, and this relationship to industry is the crucial one now in the States where some states have moved into this field and others have not. So I would be very wary about agreeing to the power until I have had the problems spelled out and had the demonstration that existing powers, and the cooperation that the federal system implies, are inadequate to solve it.

It is not a matter of doing nothing until the problems are spelled out, because I think we do have very ample powers, and I think the precaution is very well warranted. It really is everything, environmental control, and if anything



is going to reverse your federal balance it could be done here.

PROFESSOR LEDERMAN: Mind you, the word "significant" or "substantial" or any other synonym, that kind of a judgment frequently has to be made in the federal system.

PROFESSOR McWHINNEY: Yes.

PROFESSOR LEDERMAN: You don't either make it go away by eliminating words like that, or cause it by putting in words like that. That kind of a judgment often has to be made in the courts or by parliamentary draftsmen, or by officials, but I would be more worried about what it is tasked on to than the word itself.

MR. DICK: I was just going to add after what Bill and Ted had said, that "significant" is one of the most weazly words of all. To my mind, national interest regardless of environment, you have to get into that area. If you are going to get into this type of thing at all, it has to be removed from environment; it has to be removed from a single word such as "significant" or "reasonable" and it has to get down to something of the nature of national interest as distinct from this; because I have great fear (and I appreciated when Tom raised the question as a layman, very learnedly) about leaving a matter like this for the Courts. How could it help but remind me of the inconsistencies in the law you





find everywhere, but it is like the Englishman who is at the same time defendant in an action for annulment on the part of his wife, in respect to the annulment of the marriage for incapacity, and at the same time the defendant in an action for a paternity matter with respect to the upstairs maid, and he lost both actions. (Laughter) In the eyes of the English law, that is quite reasonable. I am sorry to interject my lack of faith in the Courts.

THE CHAIRMAN: It sounds to me as if he was a three-time loser.

PROFESSOR McWHINNEY: I also think that the positting of the test of conflict on terms such as the word "significant", weazly word as it is, also excludes the normal tests which are part of the federal structure in paramountcy in federal systems, which go, among other things, to reasonableness of the action, good faith of the action, mode of the action. These things are concepts of federal comity. For example, if one government, just to grab power, went into a field, it might normally have trouble with the Courts; but the moment you talk about "significant effects" it seems to me that when you make that your test you take out of consideration these other elements of good faith which are crucial to federal comity, to cooperative federalism.

I would strike that term anyway and I



would rather have, if we are thinking of weazly words, a term like "national interest" than that, but I don't like that.

MR. POSEN: The technical reason for using "significant" was that any air and water pollution has some inter-provincial, international effect, because air and water move, and they felt that if they did not qualify it somehow anything could possibly ---

PROFESSOR McWHINNEY: If you want to keep it international, you can make it something like "where the performance of Canada's international obligations are involved", or something of that sort.

PROFESSOR LEDERMAN: I would think the phrases that are used now in connection with the general power, as Lord Watson said, in matters which achieve such dimensions as to affect the body politic of the Dominion as a whole -- or by Tom Symons who I think was saying the same thing -- matters of inherently national interest and importance. Those are stronger phrases and more descriptive than a word like "significant".

MR. STEVENSON: Exactly.

PROFESSOR LEDERMAN: Those are not merely emergency powers, and they are not doing what Haldane did to the general power, but they are saying there must be a real necessity for national standards before you invoke the general power -- something that you cannot do effectively





province by province.

PROFESSOR CONWAY: Mr. Chairman, from what has been said, it seems to me the most important thing is not the constitutional one but that we should have speedy and specific investigation of the problem on the federal level. I say the federal level because I am pretty sure that if, say, the McMillan Bloedel plant at Powell River, British Columbia, is a serious cause of pollution, the British Columbia authorities are not going to bring it up; and before discussing the constitutional, legal aspects of the problem, we really need, and need quickly, a lot of very specific information.

Every time I drive to Niagara Falls, I see on the right this terrific, ghastly -- is it Hamilton?

--- (Laughter)

MR. GREATHED: Garbage.

THE CHAIRMAN: There is such a place.

PROFESSOR CONWAY: That is obviously a cause of polluting the air for miles around.

PROFESSOR CREIGHTON: The Steel Company of Canada.

PROFESSOR CONWAY: Exactly, and that is the kind of information we want.

MR. GREATHED: That is the area that Mr. Thatcher's minister represents.

THE CHAIRMAN: Ed, do you think you have



the in-put and the advice now that is necessary for you to carry this forward?

MR. GREATHED: Very much so.

PROFESSOR McWHINNEY: Do cite Lord Watson and Lord Simon. I think Bill is right to refer us back to quite specific and well accepted constitutional tests which, of course, federal officials must be aware of or should be aware of.

THE CHAIRMAN: Can I count on you, Rendell, to bring out those eminent sources?

MR. DICK: I am more the Englishman type of analysis. I rely upon my leader.

THE CHAIRMAN: If we have been over this in a satisfactory manner, I would think this would be a good point to break for lunch. Then we can devote our time in the afternoon to the next item which we are starting from scratch -- constitutional amendment procedures. It is now twenty to one. Could we resume at one-thirty.

MR. DICK: Mr. Chairman, may I express my regret singularly, not for having to leave on the constitutional amendment, but I made arrangements some time ago to devote my afternoon, with some other men, to the determination of the cause of action of the province against the polluters of the St. Clair River; which brings me from the beautiful ethereal down to the hard practicality of how we sue them. So, if I may be excused this afternoon.



--- Luncheon recess.

THE CHAIRMAN: In the September Prime Ministers' conference, one or two Premiers, including the Premier of Ontario, suggested that an item of higher priority should be the matter of amendment procedure; that we should not wait to that day when everything was set for amendment without figuring out how it was to be done. Consequently the constitutional amendment procedure is on the agenda for beginning of consideration at the next meeting and, in particular, we will be looking at it at the C.C.O. meeting next week.

To prepare the way for that, we have made a beginning on assembling some preliminary ideas and considerations within the government, which we would now like to review here and begin the process here of building up some possible position for Ontario.

Ed, would you like to introduce the work that we have to discuss today.

MR. GREATHED: Fine, Mr. Chairman. I would just like to check first that everybody has the paper entitled "Canada and the Amendment Process" dated December 1970. That is fine. A gremlin of rather large proportions got into our typewriters on this particular paper. As a result there were a rather large number of admittedly small errors, but ones which perhaps





somewhat impede the reading of the paper. I would just like to have that distributed now. They are not errors of great substance. We did think of preparing another draft, but we thought most members probably already have their copies marked up. This was unfortunate, and I apologize for these errors, but somehow they got there.

The idea of the draft, as the Chairman has indicated, is that it was done following the September conference in which there was a fair consensus that this subject should be looked at once again. I think the idea of our draft paper was that next week we might possibly present a version of it to the Continuing Committee of Officials, who in turn will have what we hope will be a fairly full discussion of the subject, and then we will all have the opportunity to go back to our respective governments and convey the impressions and the main tenor of the discussion which took place amongst the officials, prior to their meeting on February 10th.

I would just mention, Mr. Chairman, several brief points. If any member would like to give us his copy, if he has any notes on it that he thinks we should take into account in the next few days, we would appreciate having that.

I think our concern this afternoon is with the substance of the paper itself. I will propose, Mr. Chairman, if the Committee has no



particular objections, that we could start with the part, say on patriation on page 18 of the draft, unless members have some particular reservations or comments to make on the first couple of sections which, as you know, are essentially historical ones.

THE CHAIRMAN: Does anyone wish to deal with anything in the first two chapters, which are only background and historical material -- either lawyers or historians?

PROFESSOR McWHINNEY: The issue of the authority for the revising or amending formulas, is something really, I suppose, we have to accept as already decided. I mean, it raises interesting questions of methodology, whether you shouldn't try and get some agreement on fundamentals of your constitution before you worry about amending procedure, or whether to focus on the amending procedure does not in effect mean you have given up hope of getting fundamental novation of your constitution. I think these are interesting questions, and they came up, if you remember, as the paper rightly points out, during the Premier Lesage's discussion, Fulton-Favreau.

It is now Ontario policy and the Continuing Committee of Officials policy, to press revising or amending machinery as a top priority.

MR. GREATHED: I think, Mr. Chairman, in answer to Ted's comment, there has been





discussion on the alternatives to doing this (I don't think there is any secret about that) but I think certainly the Prime Minister of Ontario came down on the side on the course that we are proceeding on now.

Shortly after the September conference, we did distribute to members of the Committee three papers that Mr. Robarts released at the time of the conference, and the one entitled "The Constitutional Review Process" I think very clearly sets out his view that this matter should now be tackled; that we had had a fair crack at some of the aspects of the distribution of powers, and that it was his view that the conference should assign immediate and high priority to seeing if we could get an agreement on amending procedures. I think by that he was thinking both of the question of patriation and the question of the formula itself. Also he did mention specifically there the consideration of the delegation of legislative powers.

I think he made these statements -- Mr. Chairman, you can correct me here -- I think he made the statement then and his thinking since then has been, that he is not wedded to one particular way of doing this or another, but he thinks that the logic of the process is that we really must come to grips with this particular problem. I think that is really the answer and



that is the basis on which we went ahead with this paper.

PROFESSOR McWHINNEY: Fine. I think that settles my points.

PROFESSOR CREIGHTON: I must say, Mr. Chairman, cynically, the thought suggested itself to me that since you were making no progress with the revision of the constitution we may as well decide on an amending formula.

PROFESSOR McWHINNEY: One might make no progress without either.

MR. GREATHED: I do not think Mr. Robarts, in his statement in September, as I recall it, I do not think he thought that no progress had been made in that constitutional review; but I think he thought that if much of the results were to be brought to some fruition and to be translated into something tangible, that we had to have some kind of an agreement on this whole question surrounding amending procedures.

PROFESSOR LEDERMAN: Actually, in the whole process of constitutional review in recent years, this was a near miss. We were within one province's consent of succeeding.

MR. GREATHED: That is right.

PROFESSOR LEDERMAN: So I do not think one need to be too discouraged.

PROFESSOR McWHINNEY: You mean amending procedure?



PROFESSOR LEDERMAN: Yes, it was very close in 1964.

PROFESSOR McWHINNEY: The unholy alliance. The people that present this paper make that clear.

PROFESSOR LEDERMAN: It was a near thing, and Mr. Lesage at first consented.

PROFESSOR CREIGHTON: Yes, he did.

PROFESSOR McWHINNEY: Yes, the only reason he withdrew was, as you know, that the nationalists got on his back and he had to give way, but he had agreed.

PROFESSOR LEDERMAN: If we are going to discuss the question of patriation -- are we going to move on to that, Mr. Chairman?

THE CHAIRMAN: If we are ready to move from any questions of background or organization, we can come directly, I think, to page 18.

PROFESSOR LEDERMAN: I have what I think is a very fundamental and important point to make about patriation, and I will be as brief as I can. The position that is taken here is, I think, a correct one, that you cannot separate patriation from the amending formula, the terms on which you patriate. I base this on the conviction that it is a requirement of the rule of law, a requirement of legitimate change, that where in a constitution you have a method of legitimate change, as you have in our constitution at the moment, when you want





to change to another method of altering the fundamentals of the constitution, especially any entrenched parts of it, you must use the old procedure one last time to institute the new procedure. I developed this theme with great care in that paper that is published in the first Volume of the Ontario papers. You must use the old procedure one last time to institute the new procedure. There is no other legitimate way. The only other ways of doing it are revolutionary. It may be a peaceful revolution and all the rest of it, and blood does not have to flow in the streets, but there is no legitimate way of instituting the new procedure except to use the old procedure one last time. That means going to London with the joint address and the provincial consent, one last time.

I notice there is some serious discussion apparently of asking the United Kingdom for a simple renunciation, in which they just wash their hands of the British North America Act and repeal sections 7 or 8, which are the British North America Act sections and leave us to it.

In my view -- and I don't think this is too strong a way to put it -- that would be an invitation to revolution in this country, because the legal and constitutional position in which that would put us, I would think, would be this:



that we would have the British North America Act as it stands at present as our basic law, without any legitimate method of changing it. There would be no legitimate way. Parliament of Canada could reduce the powers of the provinces or change the powers of the provinces, and no legitimate way the provinces could alter the position of the Parliament of Canada. Because, remember, the existing Act -- on this assumption that the United Kingdom has washed its hands of it -- the existing Act says: "The Parliament of Canada can amend the constitution of Canada except for the legislative powers of provinces", and so on. The existing Act says that the provinces can amend the constitution of the provinces -- not of Canada but of the provinces -- except for the office of the Lieutenant Governor, and you would be locked into and dead-locked into that position.

The only way out of that is revolutionary, and you will get cries of popular sovereignty and conventions of some kind all over the country; and the danger of that is, well, we would be then into the Rhodesian situation of U.D.I. -- unilateral declaration of independence, a revolutionary declaration of independence. The Rhodesian affair was the first one since 1776.

I think that violates our whole position of peaceful change in this country and of legitimate change. Secondly, it is very very





dangerous, because if you invite a popular sovereignty reaction to constitutional change at the federal level, you provide a precedent for it at the provincial level, and loud and clear you will get it from the separatists in Quebec: "If you can, as the result of the popular will, simply call a convention in Canada to re-write the constitution, we can call one in Quebec to separate from Canada." You have no answer to that, unless you stay with the legitimate procedures.

So I think this is terribly fundamental, terribly important; and you are inviting incalculable trouble if you do not go to the United Kingdom one last time and use the existing procedure one last time, and get a new procedure out of it. That is legitimate, and something which neither the federal Parliament nor the provincial legislatures can monkey with on their own account, and which no self-appointed popular convention can monkey with on its own account.

What you are going to get, if you follow this proposal at the bottom of page 19, is a series of self-appointed popular conventions, and all kinds of groups will be claiming to be the voice of the popular will.

PROFESSOR CREIGHTON: The paper puts this forward, Mr. Chairman, only to reject it.

PROFESSOR LEDERMAN: Yes.

PROFESSOR CREIGHTON: Your view is that



it should not have been put forward or suggested at all; it should be rejected.

PROFESSOR LEDERMAN: I am so frightened to see it at all in any form, that I want to make doubly sure that nobody is going to buy it.

MR. GREATHED: Mr. Chairman, to comment on what Professor Lederman said and what Professor Creighton particularly has just said, I think it is the view of the Government here that the most helpful thing to do at this stage, particularly given the long and tortured history of this whole problem, is to put forward as many ideas as possible on the table, and to see if out of the consideration of those ideas some fresh technique can be devised which we can then, of course, use if the politicians agree. I do not think, again, the Government of Ontario is wedded to any one of these proposals, but it would like to see as many different suggestions put forward.

I acknowledge Professor Lederman's point, which gives me pause for an awful lot of thought, and I would like to hear some discussion of this. Even mention of this, he would reject, but I think the idea was to get the ideas just on paper.

PROFESSOR LEDERMAN: I don't think you can avoid discussing it, because the idea is being put about.

MR. GREATHED: This is my concern.



PROFESSOR LEDERMAN: But I hope you will use a large flyswatter on it every time it buzzes within reach of you.

MR. GREATHED: This was really at the root of my question, because I was concerned that if we did not put forward the various proposals and comment on them in some way, that they would then come in in a sub rosa fashion.

PROFESSOR LEDERMAN: I am not against freedom of speech on this issue.

PROFESSOR CREIGHTON: Let the others have freedom of speech. But I mean, we can trust the honour and sense of fair play of Parliament, we can trust the honour and sense of fair play of the provincial legislatures in this matter.

PROFESSOR LEDERMAN: My point goes even further than that, Donald. Parliament has no power to be honourable about; neither have the provincial legislatures.

PROFESSOR CREIGHTON: No, they have only their own powers.

PROFESSOR LEDERMAN: You have a deadlock.

PROFESSOR McWHINNEY: There are two issues. One is you are postulating the necessity for conformity as a juridical question to the pre-existing constitutional arrangement as to change before you constitutionally would have a new constitution. Secondly, you are raising what might be called really a policy type objection





that under this indirect so-called patriation (I think, by the way, I prefer "repatriation"); under this direct patriation system there would be the danger then of simply the federal Parliament legislating whatever type of constitution they wanted.

PROFESSOR LEDERMAN: Some people seem to think that if you get a simple Westminster renunciation, that gives all power to the federal Parliament even to make any change whatever in the constitution, and I reject that. I don't think that is so; I don't think simple renunciation would have that effect.

PROFESSOR McWHINNEY: There is, of course, the third type of possibility of repatriation which has been mentioned and goes back twenty years. You will find an earlier -- a middle Frank Scott article (I have just remembered he is now among the ancient and the venerables); a middle Frank Scott position that it could be done as an exercise of constituent powers simply by establishing a new grundnorm. The establishment of the grundnorm is not a constitutional issue; it is an issue in fact, and there will be nothing to stop the Canadian constituent assembly or some other body, simply postulating the new constitutional route. This is, I think, the sort of opinion that you have been referring to as being bruited about. This does exist as a



possibility.

I take it the interest of the Province of Ontario would be against accepting this or the second method, because this might mean a constituent power without guarantee that the Province of Ontario itself would properly participate in it.

PROFESSOR LEDERMAN: This business of making a new grundnorm, you are really saying what I said that you are at large with an appeal to the popular will. Who speaks for the popular will in these circumstances? How do you compose a convention and so on?

A revolution can go on that way, but my point is that that is revolutionary change, and if you want to invite revolutionary change this is the way to do it. Maybe it would come off peacefully; maybe it wouldn't.

PROFESSOR McWHINNEY: In the end the establishment of the grundnorm was an issue of fact which turns on power and may, as in the case of Rhodesia, simply depend on waiting for a change of government in Great Britain which, of course, has occurred; but it has been suggested as a way, and there is respectable opinion, in well-heeled financial terms, in favour of it. I think there would be dangers, though, that it would provide no guarantee of proper participation of Ontario in the exercise of the establishment of the grundnorm;



so that presumably Ontario's interests are best maintained by conformity, by a change or repatriation made conformably to the pre-existing constitutional arrangements for change. This is the first choice put out in this position paper.

PROFESSOR LEDERMAN: The theoretical underpinning in great detail for the position I am taking, is in the first hundred pages of the McRuer Report, Volume 4, on the Bill of Rights section, that supremacy on which the rule of law depends, lies in the accepted basic principles and procedures of your organized community, and we know what these are now. If we are going to depart from them, let us not kid ourselves -- that is a revolutionary act. It might come off peacefully, and all the rest of it.

PROFESSOR McWHINNEY: It is only legal if it succeeds.

PROFESSOR LEDERMAN: If you have a constitution, as you have in a good many countries that are dictatorships, where there is no legitimate method of change provided, then of course if you want change it is revolution or nothing; but we are not in that position. It is not the British-American tradition; it is not the British-North American tradition.

PROFESSOR McWHINNEY: It is not 1688, anyway.

PROFESSOR LEDERMAN: No.





MR. POSEN: In listening to this, I wondered perhaps if we had misinterpreted what was being argued at the conference; if in fact what was being said was that we use the legitimate route, that there would be a Joint Address of the Commons and the Senate to the United Kingdom Parliament, asking them to put an amending procedure into the British North America Act and then renounce their right to make any further change; but the amending procedure being suggested was one where Parliament alone could make the changes until the federal and provincial governments decided on their own.

PROFESSOR LEDERMAN: I think Mr. Fulton's proposal on this point was that the United Kingdom Parliament could give the Parliament of Canada the power to amend their constitution in any respect and then renounce. This is why he started talking about trusting Parliament. I would object to that on other grounds.

MR. POSEN: Yes, I think we have to look at your objections to what has been put down.

PROFESSOR LEDERMAN: Some people are putting the idea out that a simple renunciation is enough, and after that you get some kind of appeal to popular sovereignty in this country, and that is what I say is an invitation to



revolution.

PROFESSOR CREIGHTON: Surely the Province of Ontario should not present this even hypothetically. I should like to see this paragraph taken right out.

PROFESSOR BRADY: I share Professor Lederman's fears about this approach. Incidentally, this matter was discussed at the beginning of the discussions on an amending formula back in 1961, and practically all the provinces were hostile to such an approach. In the face of their hostility, Mr. Fulton very quickly, as a matter of fact, changed his attack and his approach.

I think from the practical point of view, I would agree with what Professor Creighton has just said; and it would be much better not to include it unless Ontario, in other words, was really interested in presenting this as a serious alternative. I assume that this is the kind of document you want to submit to the Continuing Committee of Officials.

MR. GREATHED: That is correct.

PROFESSOR BRADY: Then I would keep it in simple dimensions to express, as possible, what the definite view of the Ontario government was without, as it were, opening up the other possible lines; because, if there are other possible lines to open up, they will be raised, and you must be prepared to discuss them; but the practical and



convincing type of document, it seems to me, would be one that would merely explicitly indicate what the Ontario government believes to be the best procedure on this question. If it has got views, they should be expressed as directly and as simply as possible. In other words, this is not a seminar exercise you are entering on where all kinds of possibilities may be debated and argument go back and forth. I think you want to express as well as possible the views, let us say, here in Queen's Park, and you will express it, I think, better if you drop the kind of discussion about this.

MR. POSEN: I think we can accept that. I guess we should come to the other discussion. It seemed to me that what was put forward at the time or the aim of the people who put forward this idea was that in any form of patriation the amendment formula adopted in the interim until there was federal-provincial agreement on a formula, should not be rigid or inflexible, as it would be if for every amendment unanimous and complete federal-provincial agreement was required.

The suggestion was to go to the other extreme, to adopt as an interim amending formula that only Parliament be required to give its formal approval, and the suggestion was you would trust to Parliament or the federal government to consult with the provinces, and if there was strong





opposition to any amendment they would not proceed, but that it would make possible necessary amendments without a great deal of waiting or without giving any one province a veto. I guess the question was that policy consideration. Is that too dangerous?

PROFESSOR LEDERMAN: My argument about that, or my answer, would be that whether the people who propose that know it or not they are trying to have their cake and eat it too, and they can't. If they think it through they will realize that they are taking an impossible position -- short of revolution, of course.

I do not think, if you leave it out of the Ontario paper, that you need have any fear that it will not come up to be discussed. It is going to come up from other quarters as sure as shooting.

PROFESSOR McWHINNEY: I think Alex is right in the general suggestion he makes. There is no point in raising possibilities that clearly are not in the province's interest in a paper that is to be circulated to all governments. I think the alternatives you cite are perfectly respectable, and in a jurisprudential sense I am not worried about the revolutionary aspect. As I have said, it can be defended jurisprudentially, but I don't see how it can possibly help Ontario or help Quebec or any of the provinces. The only bodies who could gain by the notion that you can postulate a grundnorm as an issue of fact, that



the constituent power is a sort of inherent right; the only body which can gain from this type of argument is the federal authority, and the federal authority may not anyway wish to press them.

So I would put it simply on the basis that among the range of alternatives available, the only one, it seems to me, that clearly meets the province's interests, is the one of conformity with the pre-existing -- the Austinian type of approach, the conformity to the pre-existing constitutional authority, arrangements for change; but under certain conditions I can well see some government or governments saying, "We can't be tied down by this sort of control. We will start afresh; we will postulate a new grundnorm and set up our constituent powers." I do not see how, under present circumstances, this would suit this province's interests, or, indeed, any of the provinces' interests, since it is almost clear that the constituent authority operating in such a way would not take their interests into account very fully.

PROFESSOR LEDERMAN: With the greatest respect to Professor McWhinney, I think he has got Kelsen and Austin reversed. You are apt to stumble into the revolutionary system, I fear, if you believe in the Austinian theory of sovereignty. If you follow Kelsen, who did emphasize the procedures as supreme, and de-



personalize the sovereign ----

PROFESSOR McWHINNEY: But not as to the grundnorm.

PROFESSOR LEDERMAN: As to the grundnorm too, in my view, then you argue as I have argued. So apparently there is a very fundamental difference of opinion between us.

PROFESSOR McWHINNEY: He always postulated though that the grundnorm was a pre-constitutional, extra-constitutional factor.

PROFESSOR LEDERMAN: Not as I read it.

PROFESSOR McWHINNEY: Perhaps you have read him in the English.

PROFESSOR LEDERMAN: That may be.

PROFESSOR BRADY: Mr. Chairman, my point was -- I wonder what the Secretariat thinks about this -- I would have a somewhat simpler and shorter document. I think it is more likely to be effective.

MR. GREATHED: We have been debating that internally.

MR. STEVENSON: Mr. Chairman, those that were up at the last meeting -- I was looking at the specific notes that were taken. Was it Nova Scotia that raised this possibility in terms of favouring it or just bringing it up as a possibility.

MR. POSEN: It was raised pretty strongly, but it is not clear in my own mind at this point if





they were willing to use what has been referred to as the legitimate method -- a Joint Address of the Senate and Commons to the United Kingdom Parliament, asking them to place an amendment procedure in the hands of Canadians. The only difference was that the procedure they suggested was that Parliament alone be allowed to amend the constitution, until such time as the federal and provincial governments can agree on a final amending procedure.

PROFESSOR LEDERMAN: That is a legitimate possibility, if the provinces are willing to take the risk to "trust Parliament", as Mr. Fulton said.

PROFESSOR BRADY: Is Mr. Robarts prepared to take that risk? Has he specifically said he would like this procedure? Because this was rejected by the Ontario government in 1961.

MR. POSEN: The indication, I think, from all the Prime Ministers is that they feel that patriation must take place and must take place soon. So the problem is that if you cannot agree on an amending procedure very quickly, what kind of interim amending procedure do you accept: a very rigid one where you require unanimous consent of the federal and provincial governments, or the ultimate flexibility that Parliament alone is entrusted to make any further amendments until there is agreement?

PROFESSOR BRADY: And a related question



is: are you really going to expedite the adoption of an amending formula here in Canada by this procedure? I suppose you can argue this back and forth, but my sense would be that you are not going to expedite it; you will not speed the final adoption of the amending formula.

MR. POSEN: By patriation or giving Parliament exclusive ---

PROFESSOR BRADY: By giving Parliament exclusive power. I think that is a matter of opinion, though.

MR. GREATHED: I think your point, Dr. Brady, is properly taken, because I do not think, particularly in the discussions we have had so far, that any emphasis at all should be given to particular provincial positions on this round of discussions on this particular subject. I sense, and I hope I sense correctly, that within the conference in September the Prime Ministers and Premiers there wanted to find some agreement on this, and they did not want to jeopardize any agreement because of past problems and so on.

I think what we are seeking here -- and this is a matter of tactics and of course will ultimately be up to the individual governments to decide -- but I think the question here was not really one of substance but rather "Can we get agreement now on this question?" If the Advisory Committee, and you particularly because of your past



involvement with the discussions on this question; if you could help us towards this end I think this would be most valuable.

MR. STEVENSON: I wonder, Mr. Chairman, if there is any sense of the members here whether or not patriation should be sought as a goal separate from an amending formula per se?

PROFESSOR LEDERMAN: I think it should. I think we should seek patriation, but the only way to do it is in conjunction with an amending formula.

PROFESSOR CREIGHTON: Can't do them separately.

PROFESSOR LEDERMAN: You can't really separate the two things.

PROFESSOR McWHINNEY: Don't you think one follows logically on the other, but they could be separated? It would just leave you in a bit of a mess.

PROFESSOR LEDERMAN: A new formula is a way of doing it.

PROFESSOR McWHINNEY: It would be a mess if you separated them, but certain juridically they are separable.

MR. STEVENSON: It strikes me that governments may find there is a lot of appeal in getting patriation, even though they cannot agree on what the new formula will be.

MR. POSEN: You could have patriation





with an interim amending formula.

MR. STEVENSON: Yes.

MR. POSEN: I think that is what we are talking about -- not a final amending formula.

MR. STEVENSON: Maybe unanimity.

PROFESSOR LEDERMAN: But the interim one will turn out to be awfully long-lasting.

PROFESSOR McWHINNEY: And a worse strait jacket than Fulton-Favreau, surely, If you couldn't get agreement on Fulton-Favreau, would you get agreement on interim unanimity?

MR. POSEN: It just depends how much pressure there is from provincial governments.

PROFESSOR McWHINNEY: Frankly, what we are raising, apart from its popularity, is there any great pressure to patriate before one has agreed on whether one has a new constitution or what is in it? Are the people rioting the streets about it? They are getting along pretty well with the existing constitution by developing new glosses on it, by making inter-governmental cooperative arrangements, inter-provincial conferences, and the like?

Notionally, I mean, it is a fine thing and notionally it can be separated from amending procedures, but I suppose politically they do go together because one cannot envisage any interim arrangements that would be acceptable. I certainly cannot believe unanimity would be, unless the



unanimity would scare, surely, some of the provinces. Surely it would scare Saskatchewan and Quebec following its papers through, the people who objected to Fulton-Favreau.

PROFESSOR CREIGHTON: I think my point remains that they really show progress because there has been none otherwise, or very little.

MR. STEVENSON: This is the way I think it might easily become separated.

PROFESSOR LEDERMAN: There are great perils in allowing it to be separated.

PROFESSOR McWHINNEY: The peril is the strait jacket, that you have got it back and there is nothing you can do about it except go back to the British Parliament and say: "We have made a mistake. Reverse what you have done."

PROFESSOR CREIGHTON: "Put us back in the old colonial position again. Give us a new constitution."

PROFESSOR LEDERMAN: Pre-grundnormize your grundnorm in a de-revolutionary way.

MR. STEVENSON: So much for the first two paragraphs on page 18 and 19.

THE CHAIRMAN: Any other comments? I wish someone would settle once and for all whether it is "patriation" or "repatriation".

PROFESSOR McWHINNEY: "Repatriation" is the term I grew up with, but evidently in North America it is "patriation".



PROFESSOR LEDERMAN: I am not sure you can find "patriation" in the dictionary. I put it in my earlier essay on the subject on the theory that the B.N.A. Act had never been, strictly speaking, at home in Canada.

PROFESSOR CREIGHTON: No.

PROFESSOR LEDERMAN: And that to bring it here by these means would be bringing it here for the first time. So I dropped the "re".

MR. GREATHED: We have never questioned Professor Lederman's command of the English language. That struck me as being much more logical.

PROFESSOR LEDERMAN: I think on the basis of the Latin root it is perfectly correct use of the language.

PROFESSOR CREIGHTON: A new word! I think, as you say, "Lederman" after this, or else in inverted commas or something.

PROFESSOR McIVOR: It is logical but it ain't been here before.

PROFESSOR McWHINNEY: You made the term up, Bill? Is this where this heresy stems from, from your original paper?

PROFESSOR LEDERMAN: Maybe it does. I don't know whether anybody else has used it before. "Patria" is one's homeland in Latin, so what is wrong with "patriation"?

THE CHAIRMAN: Why would the word "repatriation" have been designed in the first place?





PROFESSOR CREIGHTON: Why not use "domicile"? It is not a very great prestige word though, is it?

PROFESSOR McWHINNEY: I think Frank Scott used the word "territorialization" or "nationalization". That is in 1949, 1950. Those are accepted words, territorialization or nationalization.

PROFESSOR LEDERMAN: Frank is now saying, "Leave it the way it is. It is valuable to be able to ---"

PROFESSOR McWHINNEY: He hasn't changed his words.

PROFESSOR LEDERMAN: "-- to go to Westminster and get it changed." He simply objects to his early thoughts.

PROFESSOR CREIGHTON: Why is it valuable now?

PROFESSOR LEDERMAN: I don't know. This is the evidence he gave in the last month before the Constitutional Committee.

PROFESSOR CREIGHTON: Is he a committeeman on this?

PROFESSOR LEDERMAN: No.

PROFESSOR McWHINNEY: He is becoming very nostalgic now that he has become an elder statesman.

MR. GREATHED: We can cite the authority of Professor Lederman if the word is



questioned. It has always struck me as being the same problem between using flammable and inflammable.

PROFESSOR LEDERMAN: I would prefer if you went back to Horace: "dulce et decorum est pro patria mori".

THE CHAIRMAN: Where do we go from here?

MR. GREATHED: We can move straight on to the formula on page 21.

PROFESSOR McIVOR: Your concluding suggestion was that Horace might help us to patriate the constitution, is that right?

PROFESSOR LEDERMAN: Help us with the term, anyway.

MR. GREATHED: I think, Mr. Chairman, just to reiterate this point, the discussion we have had amongst ourselves so far is that in this section we would take out specific mention of "the Government of Ontario thinks this and that" and "Ontario proposal". We are in a very preliminary stage here in terms of this specific round, and I think what we want to do is set out as clearly as we can what we see are the issues and the alternatives. I just mention that in connection with what follows from page 21 to the end of this paper.

THE CHAIRMAN: Just on that point, Ed, I meant to mention this before, that in a document that is going forward between officials for



discussion rather than on a government position, I just wonder whether the frequent use of these terms "honour and fair play of Parliament" might sound a little patronizing at this level.

MR. GREATHED: Yes, they will come out very rapidly. No doubt there will be a number of others to come out, too.

MR. STEVENSON: If those straw men come out, those terms come out with it.

THE CHAIRMAN: All right, page 21, "an amending formula". Perhaps you could give an overall run-through and then work through page by page.

MR. GREATHED: What we have proposed -- and members are perhaps familiar with them -- is two alternatives for a formula: one based on a 5 region grouping perhaps; one on the existing 10 province grouping. I think in terms of the details they are basically the same, so that if we considered one we would not have to reconsider the second.

I don't know what the Committee's wish would be, whether they would prefer to look at the first which starts on page 23, or go to the second which starts on page 28, and that leads us up to the delegation of legislative power at the end of page 30, which I think is rather a separate issue to consider.

PROFESSOR LEDERMAN: The only thought I have on the regional formula, Mr. Chairman, is





that it has the virtue that it gets one out of the difficulty of a veto by a very small province (the classic example would be a veto by Prince Edward Island); so I think the regional formula has a virtue over the other one for that reason.

PROFESSOR BRADY: I think that is a point.

PROFESSOR CREIGHTON: The only difficulty is about this permanence, the permanence of the regions themselves.

PROFESSOR LEDERMAN: Yes, that I see.

PROFESSOR CREIGHTON: They have a real difficulty there.

PROFESSOR LEDERMAN: Whether the prairies will always want to be considered one.

PROFESSOR CREIGHTON: Exactly, be satisfied as one region.

PROFESSOR LEDERMAN: Mr. Strong is already saying that if he is going to unite with anyone, he is going to unite with British Columbia.

PROFESSOR CREIGHTON: And not the prairies at all; that is one thought about it, but that is a unit which for a variety of reasons might not be permanent.

PROFESSOR LEDERMAN: You could combine the two things, I suppose. The critical thing is to take the smallest group of provinces and treat them as a region and not allow them the veto one by one, which means a maritime or Atlantic region.



The others are all going to be big enough, or are in fact now big enough that perhaps they are entitled to treatment as separate regions.

PROFESSOR MEISEL: There is the other side too, that some provinces may be added to certain regions. There is the North-West Territories, for example.

Nevertheless, it seems to me that none of this is imminent, and if there is an amending provision, which there will be, then presumably these things could in the future be amended.

PROFESSOR BRADY: I think you cannot, after all, in any phrasing state what is going to be valid thirty or forty years from now. You have to use the phrase if it seems applicable to the circumstances at present, and trust that in the future we will have the good sense to make alterations when alterations are essential.

PROFESSOR LEDERMAN: By unanimity under this particular formula you could alter the regions at a future time.

PROFESSOR McWHINNEY: The only difficulty, it is not a statute, it is a constitution; and even with amending procedures you enact it to last for some time, and it is very unusual in constitutional drafting to make what one would call ad hoc specifications, except on a temporary or transitional basis.

You do have this, you remember, in the



Australian constitution which mentions West Australia, and which says for a period of five years after adoption. It would be better if the same purpose could be achieved by some formula that simply said, "so many of the smaller provinces or so many of the larger" without fixing this identification of peculiarity in that province, that it is geographically located here or there. I don't know whether any equivalence is possible. If it is not, presumably we should leave it as it is. It does seem on a workmanlike basis better than the alternative of the ten province approach that you propose. Is there an equivalent that does not have the danger that Donald rightly cites of giving permanence to what is at the moment simply an existing and possibly temporary distribution?

PROFESSOR CREIGHTON: It has been changing fairly rapidly in the last ten years.

PROFESSOR McWHINNEY: I suppose the discovery of oil in Manitoba might make it change more rapidly.

MR. GREATHED: Someone suggests we will get a change in the regions before we get one of the amendments.

PROFESSOR SYMONS: Why use "maritimes"? I was going to object to that.

THE CHAIRMAN: It has been changed.

MR. GREATHED: This was an error --





"Atlantic Provinces". Someone wrote this who was not from the maritimes.

PROFESSOR MEISEL: Obviously.

THE CHAIRMAN: Ed, you just keep right on.

MR. GREATHED: If we could move then, for the sake of argument, into page 23, "an amending formula in a five-region group"; if we could move into the details, the provisions and procedures for unanimous consent on page 24, I think this provision deserves some attention and I think here Dr. Brady and others in particular might give us some comment on the width of these provisions.

Gary has also raised the question, which I think is a legitimate one, as to whether we need unanimous consent on any provisions or whether we just go for majority consent on all provisions. Again, I suppose we have to test all these notions against the background of the discussions that have gone on so far.

MR. POSEN: The question I am really raising, that the categories "unanimous consent" and "majority consent" are those used in the Fulton-Favreau formula.

PROFESSOR CREIGHTON: They are identical.

MR. GREATHED: Yes, they are.

MR. POSEN: Are those acceptable categories considering the history of the Fulton-Favreau formula, or is there another way of looking at this that we have not seen, imagined or devised?



PROFESSOR LEDERMAN: I think the diplomatic problem, if one can put it that way, is this. There is much that is very sound in the Fulton-Favreau formula, but the diplomatic problem is to offer something now that deserves the many elements that are good in the Fulton-Favreau formula but introduces enough elements of difference that you don't call it by that name any more.

MR. GREATHED: Precisely the point that Mr. Bennett raised at the last Constitutional Conference.

PROFESSOR McWHINNEY: Against the term?

MR. GREATHED: No, he didn't say against the term. As Professor Lederman stated, this is the way he stated it. He saw the problem. I think most of his colleagues saw it the same.

PROFESSOR McWHINNEY: I asked people in Quebec who sort of upset Lesage what their objection to Fulton-Favreau was, and I don't think there was any objection to categories or even principle of the categories. It was this concept of the strait jacket, nothing more. There was no objection to Fulton-Favreau as such. In other words, I think Bennett may be over-sensitive on this. He didn't object himself, did he?

MR. GREATHED: No.

MR. LEDERMAN: Mr. Fulton has just testified before the Parliamentary Committee in Vancouver, putting forward the formula again, part 1



of it. He didn't even speak of the delegation.

PROFESSOR McWHINNEY: I think the formula as such, the categories, are not merely sound, but I think they did a brilliant job considering all the difficulties.

MR. GREATHED: We will proceed on that basis. Therefore, if we could get right into page 24, into the categories, are there any comments there?

MR. POSEN: One of the problems, of course, over Fulton-Favreau and unanimous consent, was that there was a difference between Quebec and Saskatchewan on what should be in, unanimous consent. It was obviously one of the problems in re-considering it. Do you go for very narrow expression of the subject areas that require unanimous consent, or a broader expression? I don't think we have much indication from any source on how they feel. We have heard from one delegation, but I think they are in favour of very little on consent.

MR. GREATHED: Yes.

MR. POSEN: And that is about it. I think this is one of the major problems that we are going to have to resolve.

MR. GREATHED: I think in fairness to the Committee (and it is within the Committee) certainly we can pass this on. The Government of Manitoba has now advanced the view that as far as





they are concerned official languages should be the only provision subject to unanimous consent, which is essentially Saskatchewan's position of some ---

PROFESSOR McWHINNEY: It is the N.D.P. position, just as the Quebec Nationalist position is. (1), if you make that subject to unanimous consent it prevents presumably any associate state status, particular constitutional status, or something even more quasi-separatist than that. In effect that is the strait jacket concept that was used by Morin to defeat Lesage on this point. So from the two different angles, N.D.P. and Quebec nationalism, the focus is really on point (1) on page 24.

MR. POSEN: It is possible to meet the Quebec objection or the nationalist objection by stating that any diminution in the legislative responsibility of the Legislatures of the provinces ---

PROFESSOR McWHINNEY: Then leaving it at that; but then Manitoba (successor to Saskatchewan) vetoes that in your conference. If they want to take the political responsibility for that, certainly Quebec could not object to a re-phrasing. I assume if (1) were re-phrased in the way you have cited, there should not be any rational Quebec objection in terms of their self interest in any of the remainder of this.

MR. POSEN: Is there any danger in



expressing it that way, aside from the fact that Manitoba and perhaps other provinces could object?

PROFESSOR McWHINNEY: Would Ontario be? That is, I suppose, the key issue.

PROFESSOR CREIGHTON: What is the proposal?

MR. POSEN: Instead of as it reads now, any change in the distribution of powers, either of Parliament or the provincial Legislatures, would be subject to unanimous consent.

One way of meeting some of the objections to Fulton - Favreau is to re-phrase it and say that only any diminution in the powers of provincial Legislatures requires unanimous consent, but any diminution in the power of Parliament would require only majority consent.

PROFESSOR LEDERMAN: The two-thirds -- Parliament plus two-thirds.

MR. POSEN: Parliament itself plus two-thirds.

PROFESSOR LEDERMAN: And the population factor as well.

PROFESSOR SYMONS: It is worth a try, Mr. Chairman, but I wonder if that gets around the objections of Manitoba?

MR. POSEN: Wouldn't get around the objections of Manitoba, although I wonder if everybody else agreed whether they would be willing too.



PROFESSOR LEDERMAN: If I were the federal government or Parliament of Canada I would not advise it.

PROFESSOR CREIGHTON: Neither would I.

PROFESSOR McWHINNEY: Except you have your own veto, you have the Parliamentary majority in the federal Parliament.

PROFESSOR LEDERMAN: Yes, but we are talking about special entrenchment now, and I don't know that a simple majority in the federal Parliament from time to time is enough on which to rest security of the federal power.

PROFESSOR McWHINNEY: Plus the other weighted voting. I think this is the dilemma. Really only this point is the sticking point on Fulton-Favreau. Everything else I thought was beautifully drafted.

MR. POSEN: That and the delegation, I guess.

PROFESSOR McWHINNEY: Delegation wasn't even so vital, but this was the sticking point, and to get over this hurdle you have got to do something very dramatic.

PROFESSOR CREIGHTON: I don't see how the Province of Ontario can possibly recommend anything but perfect equality in this matter between the province and the federal government. They ought to have exactly the same rights.

MR. POSEN: In some ways I guess one





could argue that from Ontario's point of view it would be perfectly safe to suggest that any change in the distribution of powers should be subject to majority consent as long as it required provinces representing 50 per cent of the population; because we could be fairly sure that if Ontario objected to the shifting of the power from the provinces to the federal government, that Quebec would object along with us, thereby depriving the majority of its -- well, anything in which the possibility would be the Ontario-Quebec veto.

I guess from Quebec's point of view, they could never be sure that in all cases Ontario would go along with objections they had to a shift in power, because they would be in principle more likely to object more often.

MR. GREATHED: This is presuming there is no shift as the result of the ad in the business section of the Globe & Mail this morning by the Government of New Brunswick: "Is there any place you would rather be? Yes, New Brunswick".

(Laughter)

PROFESSOR CREIGHTON: The suggestion you made is an alternative to (i) and (ii).

MR. POSEN: For (i).

PROFESSOR McWHINNEY: You shift (i) to section (b), that is, in effect.

PROFESSOR LEDERMAN: That (i) is the big crunch, because that is the whole division



of moves.

PROFESSOR McWHINNEY: In a way, I think Ed's suggestion does meet the objection Donald voiced. He objected to an inequality of governments of provinces and the federal government, so it meets this objection; and it is a recognition of the political reality that Fulton-Favreau was beaten by that point and in effect that point only. It may be, therefore, that the contribution of Ontario is to put it forward, knowing it might not be acceptable, but at least you are out of the impasse of six years ago.

PROFESSOR LEDERMAN: Correct me if I am wrong, because your recollection may be better than mine on this, Ted. It is true Mr. Lesage fastened on this point as the reason for withdrawing his consent, but it does not follow that that was the full political reason in his mind or in his party.

PROFESSOR McWHINNEY: He had a dream though, and the official objection he gave was the, if you remember, he would never get it through: but the pressure was mounted by his academics, as you said: "Strait jacket -- this will prevent re-allocation of our federal powers to Quebec and prevent our getting associate state, particular status by constitutional means." This is, of course, true as a juridical situation.

Therefore, it seemed to me Ed's point in



fact takes us beyond that impasse, and at the same time this is subject to the objection which Donald, I think, rightly pointed to in the first suggestion that Gary made, of in effect you are providing an inequality between the federal government and the provinces if you simply entrench provincial powers in one, and not the federal ones.

So maybe to shift this to (b) with the note that it is done in recognition of the political impasse of Fulton-Favreau, might be a constructive step. At least it starts the debate.

MR. GREATHED: I worry a bit about that, Mr. Chairman, because I suppose in a technical staff paper, which this is supposed to be, we may be making a suggestion here which is not really within our competence to do. This is just one slight concern I had. This is a working document of officials rather than ---

PROFESSOR McWHINNEY: Doesn't it represent government policy?

MR. GREATHED: There is a nuance here, and I don't know if you want to discuss that, Mr. Chairman. You can't put anything forward that you can divorce yourself completely from government policy, but I think we have mentioned before that what we have tried to do is put forward as good a technical submission as possible and leave the political considerations, as such, leave the tactical considerations to later discussion. I





recognize you cannot divorce those two cleanly and neatly, but I sometimes get concerned that we might transcend that rather fine line.

PROFESSOR McWHINNEY: Certainly, you know, here your judgment must be decisive on a point like that.

MR. POSEN: There are now three possibilities. We have options that we raise here. The one that exists there is point (1) where any change in the distribution of powers via the Parliament or Legislatures or any other direction requires unanimous consent. There is a possibility that some changes require only majority consent; then the other suggestion, the unequal suggestion of diminution in powers of the provincial Legislatures require unanimous consent and any other changes require only majority consent. Are there any other alternatives?

PROFESSOR SYMONS: Mr. Chairman, there has to be another alternative, doesn't there? What is it?

PROFESSOR McWHINNEY: Diminution of the federal powers -- you know, balancing the inequality thing. You can list them as four alternatives.

PROFESSOR LEDERMAN: Unanimous consent for diminution of federal powers.

PROFESSOR McWHINNEY: Yes, you could list them as four alternatives without taking a



position. Maybe that is better than nothing at all.

PROFESSOR LEDERMAN: I have the objection to using the concept of diminution either in relation to federal or provincial powers. There will be changes you will want to make that cannot be classified as either enhancement or diminution, particularly if you entrench any new clauses. That will be diminution all the way round.

MR. GREATHED: That is right.

PROFESSOR LEDERMAN: You have to use "any change."

PROFESSOR CREIGHTON: That's very bad.

PROFESSOR LEDERMAN: Which is the way the Fulton-Favreau formula reads and should be interpreted.

PROFESSOR McWHINNEY: You can make it any reduction in the list of powers, heads of powers, something of that sort. I think that is what Gary is really trying to get to.

PROFESSOR LEDERMAN: To take that proposal we were discussing this morning about concurrency on pollution, what do you call that -- diminution or addition or what?

PROFESSOR McWHINNEY: Purely diminution because the power substantively is given.

PROFESSOR LEDERMAN: Who does it diminish?

PROFESSOR McWHINNEY: The provincial,



having, as I see it, a monopoly as the things now stand, if it shares them ---

PROFESSOR LEDERMAN: It is just a new arrangement which makes a lot of changes both ways.

PROFESSOR McWHINNEY: The federal government can leave aspects of pollution to foreign affairs and certain other heads of power, but surely at the moment it is property and civil rights.

PROFESSOR LEDERMAN: If you want to double the judiciary, go ahead.

PROFESSOR SYMONS: Is there anything following the last conference, when I gather the Quebec delegation must have indicated that it shared the objection that they should have a priority with the other members of the conference? Have they subsequently given any indication of what they might be willing to think of as acceptable?

MR. GREATHED: Not substantively, I think, is the answer. I think what they have indicated is that they are working on a presentation.

PROFESSOR McWHINNEY: When was this? Was this September? It was the new government?

THE CHAIRMAN: I think, the first point, in September, I think it is fair to say that the Province of Quebec was not one of those pushing hard for this.

MR. GREATHED: Yes.

THE CHAIRMAN: Nor did they openly object





to it going forward, although I think unofficially and privately they indicated that they would be more comfortable dealing with this somewhat on in the future than immediately. I think that is the best way I can sum up their position.

As far as the work that has gone on, we are at a very, very preliminary stage of consideration, and I think it is fair to say there has been next to no consideration up to now of how to approach this problem or on what ground to approach it, either at the political or technical level. It is for this reason, as Ed was saying, that in the meeting next week what we are there doing is attempting to make some in-put to the analytical process from which we can all come back better informed and more aware of alternatives, of problems and so on, the better to advise our governments, who will then begin to engage in discussion in February at their meeting.

MR. GREATHED: Mr. Chairman, with that in mind, could we move on to the paragraphs following on page 25, the four paragraphs which go over to page 26, in the absence of a brainstorm about another alternative, as Tom Symons asked?

Is there any question of any comments here by members, any criticisms or reservations? If not, we can move into majority consent on page 26.

PROFESSOR McWHINNEY: Are you including discussion of the referendum?



MR. GREATHED: Yes, any of these four paragraphs.

PROFESSOR McWHINNEY: Who sponsored the referendum idea with this, as a matter of interest? Was there general agreement that this was a happy institution?

MR. GREATHED: It came from us.

PROFESSOR McWHINNEY: From Ontario. Why did you sponsor it?

MR. GREATHED: When I say, Ontario, right now this is a draft paper.

THE CHAIRMAN: Where are you referring to?

PROFESSOR McWHINNEY: Bottom of page 25.

THE CHAIRMAN: Where you say:

"An amendment of this type which was

"opposed" ---

Is your question who it was?

PROFESSOR McWHINNEY: You see, "referendum" occurs a number of times. I wonder if at any stage we could refer to the recourse to that particular constitutional machinery of popular referendum.

MR. POSEN: I think one of the things we had in mind was putting in the list of requirements, of sub-areas requiring unanimous consent.

Knowing that Fulton-Favreau had its problems with that kind of history, we are looking



for other means of providing flexibility.

Whether the referendum is a successful method of doing this, I think, is open for discussion.

PROFESSOR BRADY: The Australians have not found it very flexible.

PROFESSOR McWHINNEY: This paper, I think, stresses the time factor, but I put forth the hypothesis that a referendum is essentially a conservative factor that voters, if you consult the experience of those who have used this, on the whole tend to reject.

PROFESSOR BRADY: Except in Switzerland.

PROFESSOR LEDERMAN: Except in Switzerland.

PROFESSOR McWHINNEY: Except in Switzerland, and there are other special circumstances.

PROFESSOR BRADY: And the State of California.

MR. POSEN: The situation, of course, we have here is that the amendment has been rejected by the Legislature, and the only thing the referendum is providing is for the voters to possibly overturn that.

PROFESSOR LEDERMAN: It is sort of a last forlorn chance.

PROFESSOR MEISEL: In the Canadian context, I think in the Quebec case there is certainly likely to be substantial difference





between government and mass public, and that may be something to get into.

PROFESSOR McWHINNEY: There is also a Quebec attitude, I suppose, that you have to take in mind Quebec opposition to a referendum in principle, so I would assume one decided on balance of the advantages, the extra flexibility of a third choice outweighed these things. You will probably have some not necessarily rational, but some instinctive opposition from Quebec.

MR. POSEN: I don't think the suggestions that we have put forward here would stand or fall on the referendum. I think that idea was dropped from this whole point. It might take out some flexibility, but the system would still work.

PROFESSOR McWHINNEY: I honestly don't think the <sup>popular</sup> referendum is a constitutional panacea. I would think most of the high hopes are perhaps unwarranted.

PROFESSOR SYMONS: I think it is worth exploring everything that might help us around this corner, Mr. Chairman, but I really doubt that the concept of referendum is going to be the way.



PROF. MEISEL: But unless there is some very serious objection to it, it seems to me you leave it in and you are willing to drop it.

PROF. McWHINNEY: It is expendable.

PROF. LEDERMAN: As long as it is purely in the alternative, provided the legislative group fails.

PROF. MEISEL: That is right, which it is here. I don't see anything wrong with it. It is just another not very promising but one other step which might in some circumstances be useful.

PROF. LEDERMAN: In Australia, as you say, it is a very conservative thing, and the amendments have met the legislative requirements, the Commonwealth Parliament and four of six states, but then have failed on the referendum.

PROF. McWHINNEY: You have the situation of unanimous federal two Houses and all State legislatures supporting and going on and recommending the change, and "No - no - no".

PROF. SYMONS: I think, Mr. Chairman, is it not different here? This is "instead of". As I understand it in Australia, you have to confirm by referendum.

PROF. LEDERMAN, Yes, you have to.

PROF. CREIGHTON: This is a negative thing.

PROF. MEISEL: Furthermore, I don't know why



we should baulk at something which is necessarily conservative. (Laughter)

PROF. BRADY: Mr. Chairman, I think it is a good idea to leave the referendum in actually. It gives a certain democratic flavour to it - an assumed democratic flavour.

PROF. LEDERMAN: It has a diplomatic value.

PROF. CREIGHTON: Mr. Chairman, apart from the referendum and division into five regions, this is virtually the Favreau formula all over again, isn't it?

MR. GREATHED: Correct.

MR. POSEN: Except that in this case I think Favreau required the positive agreement of provincial legislatures; where in this case unless you oppose it your agreement is assumed: the shoe is on the other foot.

PROF. McWHINNEY: There is a presumption from legislative inaction here which struck me as an interesting innovation.

PROF. CREIGHTON: And then the referendum gets over.

MR. POSEN: Is one way of getting around that.

PROF. McWHINNEY: In other words, if they don't really care.

PROF. CREIGHTON: I think that is rather important.





PROF. MEISEL: On page 26, I suppose it is my statistician's heart, but I wonder whether you really mean "representing more than 50 per cent" in the three lines from the bottom there. Do we mean "at least 50 per cent"?

MR. POSEN: Yes.

MR. GREATHED: Yes, we do. Thank you, John. That is why we have an O.A.C.C.!

THE CHAIRMAN: With statisticians and others on it.

PROF. McWHINNEY: I think those are all that arose, aren't they?

MR. GREATHED: All right, can we move on to "Majority Consent"? There is no other question about the "Majority Consent" provisions then?

PROF. LEDERMAN: Other than the Fulton-Favreau majority in two-thirds of the provinces comprising at least 50 per cent of the population.

MR. GREATHED: Thanks.

THE CHAIRMAN: All right, Ed.

MR. GREATHED: Page 27 then: "Provisions and Procedures for Amendments Applicable to some but not all Provinces". Then finally, (d) - some which concern Parliament only and some which concern legislatures only. That brings us up to the middle of 28.

The only change, Mr. Chairman, in the ten



province variant is introduced in the paragraph, right under that on page 28, in which proportions are adjusted.

THE CHAIRMAN: Otherwise it follows through the same model.

MR. GREATHED: Otherwise it follows through exactly the same. I didn't want to waste the Committee's time going through the same thing again.

THE CHAIRMAN: That would take you to page 30.

MR. GREATHED: That would take us to page 30 - "Delegation of Legislative Power".

MR. HANSON: Mr. Chairman, could I back-track just for a second to page 26 at the top, where they talk about the proclamation coming into force within six months of the date of the referendum on a day proclaimed by the Governor-General in Council. What would happen if the Governor-General in Council wouldn't want to sign it?

MR. POSEN: I think we would have to phrase it so that they were constitutionally obligated - or why don't we send the Sheriff?

MR. GREATHED: What if he didn't want to proclaim it?

MR. HANSON: For example, there might be a federal election in the interim.



PROF. LEDERMAN: You have got something there, you certainly have. The statute should itself state when it goes into force.

MR. POSEN: You could say "three months from the date of the referendum".

MR. HANSON: Or earlier at the proclamation of the Governor-General.

MR. GREATHED: This is something from the Prime Minister's department

PROF. LEDERMAN: He lives in Council.

THE CHAIRMAN: That is the result of living in close proximity in Council.

MR. HANSON: Knowing how reluctant they are to do so.

THE CHAIRMAN: All right. Page 30, "Delegation". We will have some fun on this, I think.

MR. GREATHED: Here, Mr. Chairman, I think it is in the hands of a number of experts, and the three and a bit pages here I am sure members have read over. If any member wants to introduce any general comments about it, we would be very happy to hear them.

PROF. LEDERMAN: I will state my position very briefly. I am very much opposed to this one-to-one delegation, particularly from the federal Parliament to the provinces. You could take the federal constitution apart that way piece





by piece. I am very much opposed to it; in fact I will oppose it publicly if anybody advocates it.

THE CHAIRMAN: Bill, you said you could take the federal constitution ----

PROF. LEDERMAN: You could take the federal constitution apart piece by piece. I mean, you could establish a separate Quebec state by delegating simple agreements between the Parliament of Canada and Quebec, power after power, to Quebec.

PROF. MEISEL: But does it determine the limit?

PROF. McWHINNEY: They are applicable surely.

PROF. LEDERMAN: Not that I could see.

PROF. MEISEL: If you delegate in perpetuity or if you delegate for a certain well-defined purpose?

PROF. LEDERMAN: As Mr. Justice Rand pointed out in the Nova Scotia inter-delegation case, where the Supreme Court of Canada struck down this type of delegation, it is all very well to say that in theory there is power of revocation, but you delegate powers out over various industries, telecommunications, highways, railways, certain welfare programs and so on, and you get an accumulation of vested interests established around that state of affairs; and the possession of the power becomes



more and more firmly entrenched in the hands where it is, the hands of the delegate, and revocation becomes less and less possible, the net result being bilateral constitutional amendment.

PROF. BRADY: Incidentally, when you are departing from the Favreau formula here, it is interesting that Mr. Fulton, Minister of Justice in 1960-1961, fought this vigorously and insisted that the federal Cabinet would not agree to it. The line of argument was very much as Professor Lederman's. He said it would mean fragmentation and it would mean pressures brought to bear, as it were, upon the Cabinet or individual provinces, or something or other, for positions. In other words, it would create an embarrassing kind of situation for that Cabinet: so, the provision whereby there would have to be the agreement of four provinces. I think that was accepted, but there were some provinces which did not like it. They ultimately agreed, but I think they agreed because it was essential if there were to be any agreement. The federal government was very firm on this position.

PROF. McWHINNEY: It is perhaps an exaggeration to say, Bill, that it permits the associate state status. It permits delegation of heads of legislative power as such. What you are saying is it could permit either an extraordinarily decentralized or extra-ordinarily



centralized authority. You could go so far that you would get a highly centralized or highly decentralized system, but the sovereign aspects of federation remain nevertheless. I think you would have to say that what it would mean: you would get a very decentralized federalism as one hypothesis.

The controls so far on this are, of course, the fact that the consent of all legislative bodies is required (in the federal Parliament's case, obviously the two Houses), and any conditions can be attached.

The formula here says "..... would not be subject to revocation during its lifetime .." -- the lifetime of the formal agreement.

Is it envisaged that blanket assignments without a term of years be made? I mean, is any government planning to do that?

PROF. LEDERMAN: I could not tell from this document what you were contemplating there, because it is not clear whether you are contemplating a ten-year lease or a ninety-nine year lease or what you were contemplating.

MR. GREATHED: I do not think as I recall -- Judy, I don't know if you recollect any of the discussion -- I don't remember there was any discussion of this particular ---

MRS. WILENSKY: What term?

MR. GREATHED: Of the term or anything.

PROF. CREIGHTON: In other words, it was irrevocable.





MRS. WILENSKY: No, the way I understood it, at the end of the term (whatever the term was in the written agreement); it couldn't be revoked unilaterally, in other words. In order to continue, it would need the specific consent of all parties again; and if, for example, there were a great deal of objection to the federal government having delegated this, if during the term of the agreement there were a general election which expressed this, then presumably Parliament would not renew it.

MR. GREATHED: I think the furthest we went, in all fairness to the question that has been raised about it (and you do raise certain questions in my mind again) is the last sentence of the first paragraph on page 33.

PROF. McWHINNEY: The key is the agreement or contract you made. You may, if you wish, make agreements without any limits, but the normal principle of a delegation agreement, as with any other contract, is that you specify what are the terms you consider important. If it's a term of years, "two years", if you want to put a provision for automatic renewal in then you put it in. If you don't and if you want automatic termination, you put it on.

PROF. SYMONS: Surely, what Professor Lederman says is just absolutely fundamental. If



you do have this opening for one's delegation of legislative powers, you can take the federation apart piece by piece. I do not have the expertise of a constitutional lawyer, but to a layman it seems the most fundamental point possible.

PROF. MEISEL: Yes, provided both parties are willing.

PROF. LEDERMAN: But you see what it means. You can give the whole federal trade and commerce powers to the Legislature of Quebec if you have a simple political majority for it in Ottawa, a simple political majority for it in Quebec City. How would we like that in Ontario? We would be paying toll charges on the St. Lawrence River again as we did in the days of Upper and Lower Canada.

PROF. MEISEL: I am obviously impressed by the thrust of this argument, which is obviously a terribly critical point.

In my mind, this is mitigated by two factors. One is that if you put a time limit on this in some sense, then you have some assurance; although I would think, politically, it might be very difficult, once you embarked on one of these things, to revoke it, sort of, after you have started something. This is a complicating factor.

The other one is that in purely political terms - and this depends on one's expectations of



the future. My anticipation of the Canadian political problem is that there is going to be continuing pressure from Quebec to do certain things, and many things, alone; that ultimately this is not going to pay off, even if it came to separation, and in the long run Quebec would be better off without separation; that there might be a period within which a good deal of independence for Quebec would meet their political exigencies and would slowly perhaps convince them that this is not the way to achieve the purposes to which they think they are, and in fact they are, committed; and that the more flexible the system is, allowing this but without permitting the egg shell to break, the better.

I think Bill would say that this is too flexible and that you cannot put the pieces together. I am not competent to give the judgment that Bill Lederman can, but my sort of layman's prejudice is: "Make it very, very flexible, providing you can then pull back when you think that, you know, public opinion on both sides is ready for it." If you don't, then you may press people towards breakage. This is really the kind of political dilemma.

PROF. McWHINNEY: But the other way is not really oriented towards the Quebec issue, where I suspect public pressures and the public attention are, after all, paramount, but more





to the other situation - Prince Edward Island wanting to give up certain powers to the federal government in return for special concessions and the like.

I was wondering if, in Tom's case, the objection you made was to the one-to-one notion of delegation, or delegation as such. The one-to-one, I suppose, if you object to that, could be taken care of by some provision requiring a minimum number of provinces.

PROF. CREIGHTON: That is the Fulton-Favreau formula.

PROF. McWHINNEY: Yes.

PROF. SYMONS: Yes, no problem about that. It is the one-to-one.

PROF. McWHINNEY: It is the one-to-one, not delegation as such; because delegation, to be honest, I think, in the ordinary constraint of the legislature agreeing, is a rather happy element of flexibility. But what formula would you suggest then, apart from one-to-one -- three, a minimum of three?

PROF. CREIGHTON: What is Favreau, I have forgotten now.

MR. POSEN: Four they require. For delegation, I guess, from Parliament to the provinces requires four provinces, and the other way around -----

PROF. LEDERMAN: It could be "province".



PROF. McWHINNEY: Or "region".

PROF. LEDERMAN: Because if you are reinforcing the central government you are not taking Canada apart. With the delegation from the province to federal Parliament, from a tiny province like Prince Edward Island, you are not threatening the unity of the country. As a matter of fact, I think through the existing regional development program in Prince Edward Island, half the civil servants are running under federal, and 75 per cent of the money is federal, 75 per cent of the revenue of Prince Edward Island is federal. It is the other way that the danger lies.

I am afraid I am a hard-liner. I don't even like the Fulton-Favreau formula. My objection is to the scope of the delegation. There is an administrative realm where you can have very useful delegation, and the Supreme Court has made this distinction with great skill. It is not a distinction that I could expound in five minutes, but it is a very useful distinction.

For instance, the Attorneys-General of the provinces have the administration of justice in their hands, but in the Criminal Code area it is a federal code they are administering. You have an administrative delegation built right into the constitution there, which gives you a useful element of flexibility; and in the shared-cost programs there are delegations.



For instance, the federal Fisheries will Department/give Ontario the game fishing regulations if it asks for it. Then the Ontario Department of Lands and Forests people enforce the federal regulations along with the provincial regulations about the fish, the animals and the trees for sport purposes.

Now, there can be all kinds of this sort of thing - very useful; but when you take a whole head of power, as they have attempted to do in the Nova Scotia case - the whole head of labour relations, or the whole head of education, or the whole head of property and civil rights, I say you are taking the constitution apart and you are doing it bilaterally.

So what is the use of talking about all this numbers game about majority which we have been doing earlier, if you are going to end up by saying: "Do it by agreement, boys. Any two of you can do it - any one of you with the federal Parliament can do it."?

PROF. BRADY: Mr. Chairman, for these reasons, I think if I were in power to decide whether delegation should go in or not, it would be very much on the Fulton-Favreau formula basis, because that is restricted somewhat.

I think unless the provinces alter their outlook, you will find some provinces very emphatic in favour of delegation. It is sort of





tradition, indeed, in Nova Scotia; it is one of the discoveries they made before the Second World War, that delegations are a desirable thing.

Angus MacDonald extolled it, and they always come back to it. Whether they have dropped this part of their tradition, I don't know.

MR. GREATHED: No.

MR. STEVENSON: It is still there.

PROF. BRADY: Saskatchewan used to be also very enthusiastic, and Manitoba. So I think it would be well to be prepared for the argument for delegation and, hence, what kind of delegation does Ontario want if it has to agree to some? We ought to have some views on that.

I think delegation of the kind that is in the Fulton-Favreau is less dangerous than the one-to-one kind. I will agree with Professor Lederman on that basis, but I think he might have difficulty in holding forth ----

PROF. McWHINNEY: The only thing is, you use this regional principle earlier, and maybe that should be scrapped. Otherwise I find the logical balance to using "regional" in the document a little earlier is the "regional" here. This means the West, B.C., Maritimes ----

PROF. LEDERMAN: You never win it the other way.

MR. STEVENSON: If you do use the balance and take the regions, what about two regions?



PROF. McWHINNEY: That might do it.

PROF. LEDERMAN: You see, you have the objection that both Mr. Trudeau and Eugene Forsey have made.

THE CHAIRMAN: Could we take a two minute pause?

-----Short recess!

THE CHAIRMAN: Gentlemen, I detect a current running on this subject against the delegation proposal.

PROF. McWHINNEY: Against? I thought we had reached consensus if we adopted the Fulton-Favreau modification.

THE CHAIRMAN: I mean, against the one-for-one.

PROF. McWHINNEY: One-and-one, but we had agreed on Fulton-Favreau, either the four or I thought, since we had accepted the regional formula earlier, a regional formula with the addition of "two regions".

PROF. LEDERMAN: You haven't got my agreement on part 2 of the Fulton-Favreau formula. I am opposed to it. So is Forsey.

THE CHAIRMAN: I was going to go on to say that there seems to be a current running against this one-to-one, but there seemed to be some sentiment in favour of the Fulton position or modification of it, with the exception of Professor Lederman who, I gather goes the other way.



PROF. CREIGHTON: Only because we felt it was better than the one you had there.

THE CHAIRMAN: In other words, this is not necessarily a positive; it is just a second best -- second worst?

PROF. CREIGHTON: Yes, that is right -- it is a second worst. (Laughter)

PROF. McWHINNEY: That is all I brought it up for.

MR. STEVENSON: Mr. Chairman, one thing that strikes me: one of the reasons for this particular delegation provision being put in there was to have made a good bit more flexibility in the amending formula itself.

Now, it strikes me that if you have either no delegation formula or a much more difficult delegation formula, that one should go back and look at the list of provisions requiring unanimous consent. You may find then that this list may be a little long in terms of its rigidity. I would be very curious to know ----

PROF. BRADY: I think that is an important point, because it certainly was a point under very much / discussion in the previous discussions in the 1906's . The provinces who wished delegation invariably pointed to the inflexibility of the constitution -- so many matters on which there had to be unanimity, and I think it is a forcible point that will come up again.





If you make the amending process more flexible with respect to the list, shorten the list as it were, where unanimity is necessary, I think the argument for delegation is somewhat weakened. If you don't, I think you will probably find still a strong pressure for some form of delegation.

MR. POSEN: Is it the quantity of the list or the quality of the list? It is really the one sticking point, and that was the distribution of powers item: because it required unanimous consent it was considered that the whole formula became very inflexible. Maybe I am wrong, but it seemed to me that the other nine items, for instance, on our list, arguments can be made on both sides of the coin, that they should be unanimous or a majority.

PROF. LEDERMAN: But you don't remedy that unanimity and inflexibility by going to the other extreme and allowing sweeping bilateral amendment by simple political majorities in two places.

MR. POSEN: No, the only thing I am saying - just as you can't go and just shorten the list and solve the problem.

PROF. LEDERMAN: The remedy is far worse than the illness.

PROF. McWHINNEY: I think Alec's point is basically right, that if you do not have a flexible amending machinery, you are going to have,



as everybody accepts and perhaps as the operating one - you are going to have a pressure on other measures of change, informal glosses that are really breaches of the constitution tolerated by everybody: delegation by legislative arrangements, delegation by administrative arrangements, simple arrogation of power by one with an effective protest by another. These sort of pressures are going to be there.

Bill, I would think this delegation thing is going to be very popular with smaller provinces, as it now stands. Maybe from the Ontario viewpoint, therefore, falling back on a provision - either the Fulton-Favreau, the four-for-one, or the two regions thing as Don suggested, may be the best.

MR. POSEN: There are two things we have not taken into account in our suggestion here, that we have equated the two directions in saying we should have the same formula no matter which way power is being delegated. Of course, it is possible to differentiate and devise two different routes.

PROF. LEDERMAN: I agree with Dr. Brady that the right point to zero in on is the main amending formula, and make it less inflexible. That is the honest way to go at it; not to open the back door wide through which you can drive a coach and four.

PROF. McWHINNEY: I wouldn't even be



afraid of John Meisel's type - a result that you got a sort of special constitutional status in legislative powers for Quebec by this process; but I think the political pressures against this are so great, and there is no risk of us sneaking through, like Volume 2 of our papers, without any editorial ----- (Laughter)

The tension is going to be there, and I would think the people who are going to like this, though, are the little people - Nova Scotia, Prince Edward Island.

MR. POSEN: That is because, of course, they envisage the delegation going from themselves to the federal Parliament.

PROF. McWHINNEY: Yes.

PROF. MEISEL: There is nothing wrong with that.

MR. POSEN: You could interpret that as not being a danger to the existence of Canada.

PROF. LEDERMAN: Not objecting to that.

MR. POSEN: It may distort your federalism somewhat.

PROF. McWHINNEY: By some people's views it is a danger.

MR. POSEN: But if it came the other way, Professor Lederman, your fear is that not only would it distort federalism but would stand possibly to completely break up the country at some point.





PROF. LEDERMAN: Yes.

PROF. McWHINNEY: Even the Senate would stir to life with that sort of situation.

PROF. LEDERMAN: You see, you can do a great deal to give a special position to Quebec by federal-provincial agreements, largely within the limits of the present constitution. You can write a different agreement on regional economic development with Quebec than you do with Prince Edward Island. In fact, we are doing it now. This is very different.

MR. POSEN: One aspect of the whole delegation ----

PROF. MEISEL: It is in effect doing what this proposal is doing.

MR. POSEN: Yes.

PROF. LEDERMAN: No.

PROF. McWHINNEY: Doing it by the back door rather than the front door.

PROF. LEDERMAN: Well, you have to distinguish between the scope of discretion that is involved in the decision. For instance, I think the federal-provincial agreement whereby the Province of Quebec is allowed to operate its own pension scheme was a good one, because in the agreement the national uniformities are taken care of. They have agreed to the same scale of benefits, same entitlements, and the same kind of funding; so that you do not get, as a result of



a separate Quebec pension plan, a different cost of doing business in Quebec or Ontario. All right, there is a lot of that you can do, but you don't have to monkey with the main heads of legislative power to do it.

MR. POSEN: In delegation do we assume that the government to whom the power is delegated pays the shot or could this differ, I guess, by every agreement?

PROF. McWHINNEY: Part of the contract.

PROF. LEDERMAN: The collection or division of tax fields and of tax harvests, I think, has to be dealt with apart, even, from the main distribution, let alone the delegated distribution of powers. You cannot make the two coincide.

MR. POSEN: I guess it would be interesting from Ontario's point of view if there were delegation from the smaller provinces to the federal government and the federal government paid the shot for the powers that were delegated, and Ontario and Quebec kept their own powers and paid their own way. How much distortion that would create ---

PROF. LEDERMAN: Where you are dealing with money and an undertaking, regulation is not such a big element in it and you can write all kinds of particulars in agreements but providing the money and resources.

THE CHAIRMAN: How do you think we



should conclude this then, Ed, for our purposes?

MR. GREATHED: I think we have taken very detailed notes of the discussion, and we shall just have to give it some very hard thought in the next few days prior to going to Ottawa. I would hate to give a sort of off-the-cuff ----

THE CHAIRMAN: Well, the other way is to neutralize it by converting this section into a discussion of the pros and cons of some of the positions that have been raised here to-day.

MR. STEVENSON: Could I ask one question on this to try to make it a little clearer, I suppose? Is there a sense of the meeting that if you don't have delegation at all, or if you had a very rigid delegation, that you could then drop (1) "any changes in the legislative responsibilities of the Parliament of Canada or legislatures of the Provinces" from the unanimous approval?

PROF. McWHINNEY: If you didn't have the delegation?

MR. STEVENSON: If you didn't have the delegation.

PROF. McWHINNEY: That you could drop it?

MR. STEVENSON: Then make it a majority provision.

PROF. LEDERMAN: I think the two-thirds plus 50 per cent rule for most of the division of powers, is perhaps all right. All I would say





is that is the honest way to go at it, and not to open the back door wide with the one-to-one delegation thing, because you are just undoing everything you have done earlier.

PROF. McWHINNEY: I think I would agree on the question that you pointed out. I think the two are clearly related, and delegation is a method of correcting rigidity either in the positive law, black letter law, of your amending process, or the working practice such as you get in Australia, where theoretically it works easily but in practice it never works.

So the two are related, and if you have an easily operating amending machinery, the case for delegation is the minimum; but if the amending machinery does not operate easily, then informal processes of constitutional change like delegation, and also like, simply, unilateral violation of a constitutional provision without effective protest by those affected, would come into play.

PROF. LEDERMAN: I think Mr. Fulton only accepted, or I suspect he only accepted Part 2 with that four province limit on it because he regarded it as completely impractical and unworkable or almost so.

PROF. McWHINNEY: Why?

PROF. LEDERMAN: Because it would be very hard to get four consents.



PROF. McWHINNEY: You have got six consents; if you look up the Australian case, you got all the states consenting but you never got the follow-through in certain cases.

PROF. SYMONS: Is there any way, Mr. Chairman, of expanding the concept and making it a more vital concept of administrative delegation? This one does not seem to me to have any of the constitutional implications that I find disturbing about legislative delegation, and it seems to get the flexibility that John wants.

PROF. McWHINNEY: It exists already, as Donald points out: it is one of the great phenomena of Canadian fédéralism that you do have this all over the place.

PROF. LEDERMAN: This is the existing law, and it is working pretty radically.

PROF. McWHINNEY: Because I suppose they tend to view them as vested rights, and it is very hard to change them back again; whereas the formal delegation normally has a term of years attached, or at least some contractual limitation. But I find the vague of the thing is that the more you get these natural law notions of acquired rights that there is a constitutional longing to change them; and certainly if you change any of the suggested special rights in Quebec now you run into this natural law battle.

THE CHAIRMAN: We will try to make



something responsible out of this discussion.

At least if we have accomplished nothing else to-day, if the Committee does at some point come to an end, we have our epitaph: "Experts in the second worst"!

One other item of new business, unless someone else has one, which I almost hesitate to raise because it might be good for a couple of hours, but I raise it anyway: this is the question which was put to us by the chairman of the federal Joint Committee on the Constitution, asking if the members of this Committee would be interested in an informal, off-the-record dinner meeting with them to discuss a variety of things.

On the one hand, there are perhaps three things we should bear in mind: first of all, that it is proposed, I believe, for April 1st, and we cannot perhaps pre-judge our existence at that stage. I hope we will still be there. Secondly, it might prejudice any view you had about subsequent appearances before the Ontario Legislative Committee which was constituted at the end of the last session and will resume, in fact will begin its work, next session.

MR. STEVENSON: Not necessarily subsequent. The possibility remains of a connection with the Ontario Committee even before that, I suppose.

THE CHAIRMAN: They wouldn't resume before the session though.

MR. STEVENSON: Right.





MR. GREATHED: They can't.

THE CHAIRMAN: And I can't see the session resuming very much before this date and getting going, although it might.

PROF. MEISEL: Did you say April 1st? That is most appropriate.

THE CHAIRMAN: Thirdly, of course, this Committee is constituted to advise the Prime Minister of Ontario.

On the other hand, having said all that, I take it they are at some pains to indicate that this was an informal, off-the-record session; so I think it puts it in a different category from a formal appearance. What would the views of the members be on that?

MR. GREATHED: I think, Mr. Chairman, the reason for the date is that when the Parliamentary Committee came to town in early December they had a number of briefs from interested Toronto-based organisations which were not quite ready. Therefore they have to come back here a second time.

THE CHAIRMAN: It seems they not only came to town but they went to town on some of the witnesses.

MR. GREATHED: That is right, including one of the former members of this Committee. So they are returning to Toronto for March 31-April 1, and they were propose that on their last evening they have this informal discussion.



PROF. McWHINNEY: One of the problems is, as I am sure you have noticed if you have read the reports, that the membership fluctuates day to day. They have about fifteen, but they bring in all sorts of different characters at times to make a quorum. Would it be fifteen or thirty?

MR. GREATHED: It's hard. I can't speak for them, but I think if the Committee is in existence at that time and if you agree to meet with the Parliamentary Committee, I imagine that the co-Chairman would make a very serious effort indeed to have everybody out.

PROF. LEDERMAN: At the end of two days of hearings they should be groggy, and we would have them where we wanted them. (Laughter)

THE CHAIRMAN: Is that the end or the beginning?

MR. POSEN: It would be at the end.

PROF. CREIGHTON: On April 1st.

PROF. McWHINNEY: They are very earnest. I think several of us have appeared before them. I testified for about four hours. I was surprised at their energy.

THE CHAIRMAN: Bill, you were up, weren't you?

PROF. LEDERMAN: Yes, I started at three-thirty, and we were still at it at six-twenty. So they are very earnest, and the questioning was very good.



PROF. BRADY: A long dinner party!

THE CHAIRMAN: Yes, I was thinking.

PROF. SYMONS: Is that in Toronto, Mr. Chairman?

THE CHAIRMAN: Yes, in Toronto.

PROF. SYMONS: Why not?

PROF. MEISEL: I don't think there is anything wrong with it.

PROF. CREIGHTON: We had this fabulous meeting with the Quebec people.

PROF. LEDERMAN: I would be in favour of it.

PROF. CREIGHTON: I don't see why we shouldn't have it with the federal people as well.

THE CHAIRMAN: My own view is that since it is informal and off-the-record, it raises no particular institutional problems of any kind, and having heard no dissent I suggest we -----

MR. PERRY: Who pays for dinner? Do we or they?

THE CHAIRMAN: Harvey, you have come to a very important question. Are they inviting us to dinner?

MR. GREATHED: I think we can so arrange it, Mr. Chairman.

THE CHAIRMAN: Well, in that case we will say "definitely".

MR. STEVENSON: Mr. Chairman, in this discussion, it just struck me that we have discussed





a couple of times the form in which members of the Committee might appear before the Ontario Legislative Committee, if asked, and there is a possibility that when the question comes up we might want to suggest that this is perhaps a very good way of doing it - having an informal session for an evening rather than a more formal Committee hearing.

THE CHAIRMAN: At least for a starter.

MR. STEVENSON: For a starter.

PROF. LEDERMAN: The individuals could later go before them -----

THE CHAIRMAN: Exactly.

PROF. LEDERMAN: And say "I am speaking for myself, and this is what I think."

THE CHAIRMAN: It would be an opportunity for them to meet people and be a little more relaxed than sometimes happens if you were meeting, shall we say, certain nameless people the first time in the more formal surroundings.

Is there any other business?

PROF. SYMONS: Mr. Chairman, if we are going to come for that gathering, might we take the occasion to have our next meeting?

THE CHAIRMAN: I was about to suggest that other things being equal, depending on what we are called on to do in the intervening time, we have normally tried to strike our regular quarterly meeting, which would have been in March.



























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Government  
Publications

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

M E E T I N G

at

T O R O N T O

on

FRIDAY, APRIL 2nd, 1971

-----

VERBATIM REPORT OF PROCEEDINGS





ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

M E E T I N G

at

T O R O N T O

on

FRIDAY, APRIL 2nd, 1971

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VERBATIM REPORT OF PROCEEDINGS





ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Meeting held in the Treasury Board Room,  
7th floor, The Frost Building, Queen's Park,  
Toronto, on Friday, April 2nd, 1971.

PRESENT:

Mr. H.I. Macdonald (Chairman)

Professor A. Brady

Professor D.G. Creighton

Mr. G.E. Gathercole

Professor W.R. Lederman

Professor R.C. McIvor

Professor E. McWhinney

Professor J. Meisel

Mr. J.H. Perry

Professor T.H.B. Symons

Mr. R.N. Seguin

Mr. E. Greathed (Secretary)

Mr. A.R. Dick

Mr. D.W. Stevenson

Mr. G. Posen )

)

Mr. N. Mailhot ) Secretariat

)

Mrs. J. Wilensky)

---

"Regrets" received from  
Professor J. Conway





--- At 10:15 a.m.

THE CHAIRMAN: Well, gentlemen, there are three principal items on the agenda this morning: the remarks of the Chairman, the report of the February Constitutional Conference, and the discussion on our meeting of last evening.

I think, by way of background to the letter I wrote about the Committee, I guess a number of factors came together in one time and place. Over the lifetime of this Committee, as you know, five members had left us for one reason or another, and quite a few others from time to time had raised the question as to whether they had not perhaps given enough time and effort to this function, and all of us, I think, in the Committee from time to time had discussed what the future of the Committee should be under the new circumstances.

We concluded, following our discussion here and following a discussion I had with the former Prime Minister, that the proper thing to do would be to wait until March 1st, when the new Government took over. Following that event, I had one or two conversations with Mr. Davis and brought him up to date on the background, the general conclusions of which, in his view, were the following. First of all, he felt that the work of the Advisory Committee itself and the



advisability of having such a function continued to be an important one, and he wanted to continue with a re-incarnation of an Advisory Committee on Confederation in some form and proposes to establish such a Committee. Secondly, he has some ideas, however, about the terms of reference, which would not exclude the kind of things this Committee has dealt with in the past, but perhaps add some other items which might suggest the addition of other people of other types of background or expertise. Thirdly, the decision to form a new Committee would not in any way -- and I would like to emphasize this -- imply that he would rule out invitations to any members of this Committee who might be interested in serving on a new Committee with its new terms of reference, if that were congenial to them, and so on. However, by the same token, he did not want to be in a situation in which one did not really face the question deliberately about the future of the Committee but merely drifted along without ever considering whether some might wish to leave or give it up.

So that I think the steps now are these, that the life of this present Committee would conclude today and conclude, I hope, on the happy note of the man who appointed us and who created the Committee coming to lunch with us today at the Park Plaza and having an opportunity to say to you what he felt about the Committee.



Then I will be working with Mr. Davis about trying to put in shape exactly what he thinks he wishes to have for a new Committee, and I propose informally having a chat with each of you, or you might be good enough to let me know your own thinking, as to really how you feel about this whole exercise.

It seems to me there are a variety of possibilities. Any individual may feel that really he has had enough and would like to do other things. He might feel interested in serving on a new Committee, but that in turn would fall into two categories: either interested in serving (period) or interested in serving depending upon exactly what the Committee was designed to do.

I think that is about as much as I can say about the present status. Certainly if there are any questions I will be happy to respond.

MR. PERRY: The new terms of reference you speak of, will these be disclosed at some time before we make up our minds?

THE CHAIRMAN: Oh, yes. I think the first thing to do is to define what the Committee is going to do, and then consider the names of people who might be appropriate for such a Committee; also to find out which people might regard such a Committee as congenial to them in terms of whether they would be interested or not.

PROFESSOR McWHINNEY: Mr. Chairman, I am





interested in terms of political science and constitutional law as much as anything else, but have you yourself any general conclusions in relation to the utility of a non-parliamentary committee as compared with a parliamentary committee and the liaison between the two? You know, this matter has been discussed at the federal level, also in Quebec and other provinces. Do you think there is a time when the non-parliamentary committee functions better than the parliamentary committee? Are there any general conclusions that you can communicate to us?

THE CHAIRMAN: I think it is apples and oranges, Ted. This is purely a personal view, but I think it is very important that there be parliamentary committees, simply because I think it is very important that there be opportunities for those who are elected to office to be as fully involved as possible. I hope, for that reason, that the Legislative Committee which was constituted in the dying days of the last session will be reconstituted or some such committee will go on. I think it is very important that it should.

I also say, and intend to say at noon, that I think the experience of this Committee has been a considerable one in the life of the Government of Ontario and in the development of good policy -- and often just as important to the



avoidance of bad policy -- over these years. I am greatly convinced and, of course, personally greatly indebted to the Committee, because we started -- those of us who started intensively in this five years ago -- started pretty cold. At least, I did. It would be really inconceivable to me to think of that period of time without the input and the nourishment that we have had from this Committee.

Then I see a number of other dividends, I think. I hope that the universities of Canada, or each of you in your individual areas of work, in turn are the better for what this Committee may have given to you and you in turn to your classes or your associates, or whatever.

I thought very carefully about what recommendation I would make myself to the new government, because one is always in the difficult position of finding the middle ground between what you think is right and what might be (no matter how objective one is) a temptation to suggest that you want to perpetuate your own activity or place in the thing. So I did suggest to Mr. Davis that in my opinion having such a Committee was not less important but perhaps even more important now than it had been in the past, but for different reasons: because the nature of the work that had to be done was a little different, and because there was a new government which presumably would benefit just as much from advice



as an old one.

I did also advise that I felt that the new Prime Minister should be completely free in whoever he wanted to have on such a Committee and for whatever purpose, from the Chairman down. I think that is pretty much the position he is following.

MR. PERRY: Is it fair to ask, Ian, whether you feel that this government has the same sense of the contribution that such a Committee might make, that Mr. Robarts had?

THE CHAIRMAN: I think in general terms the answer is yes, because Mr. Davis himself in his campaign attached a great deal of emphasis to broadening the basis of government to include people outside the internal machinery, and to involve more people in the government, to try and achieve that goal. So that I think in those general terms -- yes.

As far as the work of a particular Committee here of this kind is concerned, I think the fact of the matter is that the government has been in office for a month and a lot of things have been thought and talked about, but perhaps not everything yet in the degree of detail, and that is why I really am not able to be very specific about what a Committee might do and so on. The time has just been very short.

PROFESSOR SYMONS: Mr. Chairman, if it would be helpful to have a comment about this





development from one member of the Committee, I welcome the decision and the course of action that has been followed. I am sure that most of us, or all of us, do. It seems to me utterly appropriate and timely that the new Premier and the new Government should have a clean slate, including cleaning up such bodies as ourselves, and should have the opportunity of thinking freshly about creating its own advisory bodies, if it wishes to have them.

While I appreciate, for one, the sensitivity with which you have approached this, and the way in which you suggested that we might mention to you the way in which we would wish to consider giving further service in some other form, I for one would be very hesitant about that. I think it is most important that neither the new Prime Minister, nor you, should find yourself in any position of being under some sense of obligation if one of us expresses interest, because of the service that we have given during the past six years. That is something that inadvertently we could do: we could somehow, without meaning to, encumber the government. I think it very important that there be no sense of obligation to us in view of our work in the past six years.

I do share your view, Mr. Chairman, that there is a need, and I think it is greater, for the new Government to have access to continuing advice not just from political sources and not just



from its own permanent civil service advisers.

I think this is a continuing need and one of great importance.

I was happy to note in your letter describing the somewhat different concept of an advisory committee that the new Premier seems to have in mind, that he was shifting away from the focus that we have had almost exclusively (almost amounting to a pre-occupation) with matters of language and of Quebec. I think they are also more important, not less important; but I think, as was demonstrated at our meeting last night, the stresses and strains in the Canadian Federation now are increasing, and I think they will concern new areas in a way that has not been so much the case during the time that we as a Committee have been performing. It seems pretty clear that extraordinary tensions that will affect confederation and federal arrangements are building in the west, and I think they probably are in the Maritimes too. That is one aspect of the new approach to advice on confederation matters that I think will need to be looked at.

I just want to say how much I welcomed the move that has been taken and the sensitivity, courtesy and generosity with which it has been done.

THE CHAIRMAN: Thank you, Tom. You remind me, just before I forget, of just one point there:



that if, as the result of your experience, any of you have any thought as to the kind of issues or the kind of approach that the new Committee might take, I would be most grateful to receive as soon as possible from you a short note, however brief or however direct, of suggestions that might help me in helping Mr. Davis to formulate more explicitly and exactly the course that things might take.

MR. SEGUIN: Mr. Chairman. I have already told Mr. Davis that I wish to be replaced on this Committee. I did not know what form it would take or anything like that. However, I make it with a proviso which I do not want in the minutes.

--- Off the record discussion.

You asked about the composition of the Committee. I have nothing against professors. I am Chairman of the Board, and if I said that at my own university I would be lynched, but I think that this Committee should include union people and business people, people from strong unions and business people from bankers' associations or insurance companies or people of that nature. I think you should have a general representation of the people of Ontario. I am not saying you should exclude university people: on the contrary, they should maybe be in the majority.

I came here this morning, although I was not going to come, because I said to myself: "Well,





there will be nothing much said. We will just say goodbye, and it will be like New Year's Eve, singing Auld Lange Syne, or something like that"; but I came as a Franco-Ontarian to thank all my colleagues here for what they have done for my people. In my association we have worked hard, yes, and we would still be working hard, but I am sure that without the efforts of this Committee we would not have obtained what we have obtained from the Robarts Government in the last five years. I know some of you objected to it at the time, but I still think that in your own hearts and feelings you wish to save Canada and have some more money here in Ontario and anywhere else in Canada.

We, the Franco-Ontarians, today are satisfied and we do not wish to push too far or too fast, either. As for the Courts, as I said last night, we are not requesting Courts overnight. This is a matter of years, and when I say "years" it may take twenty-five or thirty years before we have sufficient qualified personnel.

I also mentioned the fact that the number of Franco-Ontarians at the University of Ottawa has doubled since we have got the secondary schools. This means that more of my people will be available eventually to take better positions, whether in the Government or otherwise. Then they will, as the result of that, be able to develop their culture.



Culturally we are far behind the English speaking people, for two reasons. The first reason is that we did not have enough educated people. Secondly, we did not have the financial means. Gradually, however, this will change in view of the fact that now we can get to university and come out as university graduates, take on better jobs and have a better outlook on the world.

--- Off the record discussion.

Again, I thank you all for your help and wish you luck. If at any time I can be of assistance, it is only a matter of calling me and I will do what I can.

THE CHAIRMAN: I very much appreciate that, Roger, and will certainly look to you for suggestions about personnel for this Committee, and continuously for advice on the questions that you have carried to us.

MR. GATHERCOLE: Mr. Chairman, I thought that Tom Symons put my thinking very fittingly and appropriately. I have not been as regular as some in my attendance at meetings, but I think I do go back to the beginning and the formation of the Committee, and I must admit that I have found it extremely interesting, indeed fascinating, to be associated with the gentlemen who have been members of this Committee. I think the choice that was made has been excellent. I am very far removed from suggestions that any



committee should be representative of business people, bankers or financial individuals, economists, or anyone else, Roger; that is my view. I think the members of any committee which is appointed to a task should be appointed from a standpoint of the contribution that they can make to the objectives of the committee. In this instance, I think it is very appropriate that the Committee should be heavily weighted with professors. The selection in this instance was, I think, quite outstanding. I have sat on many committees in my time, and I have found this one very stimulating in every respect.

I would think, Mr. Chairman -- I suspect this anyway and hope it will be so -- that the trend in the discussions of federal-provincial relations will put a little more emphasis on the economic side of it. I know these matters of constitutional reform are vital and extremely important, and they make progress very, very slowly: but I think this trend is going to play a much more dominant role in keeping Canada working harmoniously together in the future. I think you can have abuses and excesses creeping into some of the mechanisms that have been established under the present system, and I think some of these mechanisms and methods should be examined very, very carefully. That is all I have to say, Mr. Chairman.





THE CHAIRMAN: I don't know if there are any other comments on this. I might, while we are being a little whimsical about the folklore of the Committee, tell you this, again off the record.  
--- Off the record discussion.

PROFESSOR CREIGHTON: I don't think there is anything I want to say, except to approve what Tom Symons has said. I think it is entirely appropriate that the Committee should cease as presently constituted. In fact, you may remember that I suggested we should collectively hand in our resignations. I think that would have been an easier way in which to end the Committee because then Mr. Davis would not have been obliged to advise us that that is what he wants us to do, so that he may have a clean slate on which to write the names he wants. I do not feel, though I speak for myself alone, of course, that I particularly want to say that I would be interested, or on what terms, until the names are known.

PROFESSOR SYMONS: Mr. Chairman, you touched on the difficulty you found yourself in in being roped in as Chairman of the Committee. Perhaps there will be other opportunities, but just when we are together as a Committee, I think I can say that all members of the Committee share my feelings about how fortunate we have been in having you as Chairman, and how thoughtful and patient has been the leadership which you have



given to this Committee. It has been a very great pleasure to serve on the Committee and a very large factor in that has been the quality of leadership you have given as Chairman, which we all appreciate very much.

--- Applause.

MR. SEGUIN: Can I add to that, also our staff.

PROFESSOR SYMONS: Indeed.

PROFESSOR LEDERMAN: Mr. Chairman, I was going to say a few moments ago that I wanted to second everything Tom Symons has said, and I really have nothing to add to it; and as to his last remarks, I second everything he said doubly and in spades.

THE CHAIRMAN: Thank you very much. I can become sentimental very easily, so we had better get down to some business and turn to item two.

MR. PERRY: The economic wing here is maintaining a subdued silence. We are just overcome with the occasion, I think.

THE CHAIRMAN: I think you are overcome by meeting in the Treasury boardroom.

MR. STEVENSON: On the side of the defendants.

THE CHAIRMAN: Yes, this is the side where the Government, the Ministers and the Board usually sit, and this is the side for the supplicants.



MR. PERRY: The wailing ones (laughter).

THE CHAIRMAN: The conference in February was very important, of course, for a number of reasons. Ed, I don't know if you or Don want to make a resumé of where that went and where it leads to.

MR. GREATHED: Mr. Chairman, I might say briefly that the members have received, and no doubt are quite familiar with, the statement of conclusions; and in a way, I suppose, the discussion on agenda item 2 can be linked with item 3, because I think we had a very candid discussion last night about some of the issues that came up, and I think that both you and Mark McGuigan described the kind of atmosphere of that conference and some of the problems that we encountered.

I think what we are faced with in the next few months is a series of multi-lateral and bi-lateral meetings at which the general terms in the agreements of February 8th and 9th are attempted to be translated into more specific language and into more specific proposals which the Prime Ministers and Premiers can consider at the conference in Victoria in June. That is really the dimension of the task that is facing us, and I think here, of course, there is a very special responsibility of the federal government who are the sort of principals in the negotiations --





but also, of course, our own responsibility -- for making suggestions and so on. I think this is the sort of work that we are about to get engaged in, and until we do get engaged in it quite fully I really do not think there is very much more to say.

I think, however, that we would be particularly interested -- and, as I say, you may want to link it with item 3 in the agenda -- in having the views of the members of the Committee on the statement of conclusions and on the kind of thoughts they have as we face this rather difficult task of making the proposals more specific for the First Ministers in June.

PROFESSOR CREIGHTON: Mr. Chairman, I was not present at the meeting last night: at least, I was for a while, but I had to leave early to catch a train. I presume that at some point or another there was a discussion of the conference. I was not there to hear any precise indication of what was decided there, and particularly about the matter which has got a good deal of publicity in the papers, which is the position of languages in Quebec. What was the agreement or the arrangement there, can you tell us, please?

THE CHAIRMAN: Well, we explained, or at least I offered my impression of what happened and so did Mr. McGuigan, and I think they were the same: that the language issue I frankly do not



think people expected to take the turn of events it did -- the section 133 issue. It came up fairly neutrally and Mr. Bourassa, supported by Mr. Trudeau, said that of course if we were going this way this will change the traditional position of the English language in Quebec, and the logical thing will be a kind of parity: that unless there is the same provision for the language minority in English-speaking Canada, you cannot expect it to continue in Quebec, period.

As I was saying last night, I never cease to be surprised that this did not literally blow the roof off the conference centre, but it was all very quiet, and I think I am correct in this recollection that one of the western Premiers (perhaps Mr. Bennett) rather than jumping on this, I think, pulled the rug by saying: "Well, I guess that would be a good balanced situation, wouldn't it?"

Mr. Robarts, I know, got very uneasy, and he said, "This, you know, is not the kind of solution at all that is reasonable to contemplate or possible to undertake."

Then there was quite a bit of discussion, again fairly low key, and I went away with the impression not so much that people had different views as to what happened but just that really nothing very much happened. It just hung there, it just suspended there without very much talk,



or certainly any detailed talk, about the implications and the broader political ramifications, or anything else.

What actually came out in the communiqué in fact, Ed?

MR. STEVENSON: Page 4.

PROFESSOR CREIGHTON: It is just there by omission, that is all.

MR. GREATHED: I think, just as a footnote to what you said, Ian, the parity issue probably struck home quite forcibly but here the First Ministers were most concerned about getting an agreement in principle, and I am not sure they necessarily felt -- perhaps this just came collectively without anybody saying it -- that they wanted to go into the detail now, but to leave the thought that this was the kind of policy issue they were faced with, and that the subsequent discussion which would take place after February and before June would have to confront this and other issues. I think that is probably an explanation of what went on. You cannot read, and I do not want to read, into the minds of the politicians around that table, but I think they just perhaps felt that this was some detail that if they started discussing then it would take an enormous amount of time to get through to any conclusion; and I don't think they wanted to impair the general consensus that





there seemed to be around the table that we agree on a series of proposals such as was contained in the ---

PROFESSOR BRADY: Would it be right to assume that actually they were not agreeing in principle, necessarily, to this idea, but that the idea was being studied and they would consider it?

MR. GREATHED: That is right.

PROFESSOR BRADY: And the product of the consideration would appear definitely in June.

MR. GREATHED: At least, the alternatives, the options, would be put before them.

PROFESSOR BRADY: Precisely. After all, the one thing that strikes you about this conference in February -- and all an outsider can judge is by this document of conclusions -- is the immense territory that is covered. I mean, the amending formula itself has occupied conferences in the past for hours and days, and here it is treated merely as one of a number of important matters.

I think the amending formula that is suggested there is a decided improvement upon the Fulton-Favreau; but some of these other questions, like the language one, of course, have not been really explored in federal-provincial conferences since 1968, as far as I am aware. I assume that the Premiers thought: "Well, we



can't discuss this now. We will have to think about this and discuss it in June." Am I right in this type of assumption?

THE CHAIRMAN: I think that is right, but there was one other feature about it. Was there not some suggestion that the English communiqué and the French communiqué did not appear to say exactly the same thing?

MR. GREATHED: That started it.

THE CHAIRMAN: Started the whole business.

MR. GREATHED: Yes.

THE CHAIRMAN: Have we checked that out as far as our own interpretation of those communiqués?

MR. GREATHED: I was going to ask about that. Gary, did we look at that?

MR. POSEN: I am trying to remember where there was a difference, whether it was in the social policy area of the communiqué or language.

MR. STEVENSON: Social policy, and the other thing was the omission in the French text of the Quebec reservation on language rights. Those are the two things.

THE CHAIRMAN: That is the one, and the other was that the English communiqué merely indicated that Quebec wanted to continue to discuss social policy in the context of the total package, whereas the French communiqué, it is alleged, made it appear a little stronger, as if



the agreement on other things in the package were contingent upon a satisfactory agreement to the social policy issue.

MR. POSEN: Almost the difference between "agreed to consider" and "agreed".

PROFESSOR McWHINNEY: I think that is a fair interpretation. As I say, I had not myself noticed an ambiguity until my attention was directed to it, but I went through it in detail and there is a considerable divergence in the implications in the two versions. This is why I said to Ed when we met several weeks ago, that it struck me as one of those deliberate institutional devices to produce a consensus, that you give slightly different texts to each group, but Ed explained to me that this was not how it occurred; that it was just the ordinary gamesmanship.

MR. GREATHED: It was also the pressures that were confronted. I mean, the conference was only for two days, and the communiqués, unlike some conferences I have had, are not produced ten days in advance of the conference.

PROFESSOR McWHINNEY: Sure.

THE CHAIRMAN: And it was packed pretty tightly that day, by the way. The second day they started at ten in the morning and worked right through, having lunch at the table to keep working right through to six o'clock, and they were setting a pretty hot pace.





PROFESSOR McWHINNEY: One should also say that as a result of this misfortune, I would say, the adoption by Quebec of this new formula for amendment is very contingent now. There is an unholy alliance building up, much as happened with the Fulton-Favreau, which may cause Bourassa to withdraw.

The English language community is very upset about section 133, what it considers to be entrenchment. On the other hand, the nationalist wing of the Parti Québécois and the Liberal Party, for that matter, are upset about what they think is a constitutional straitjacket, having in mind Quebec's plans to get extensive powers back from Ottawa. Some groups have collected massive amounts of detailed study of the implications of these two texts. It may all start pouring out in the next month or two. The discussions of it were very considerable, and in making a prediction I would think it is contingent really whether Mr. Bourassa will be able to deliver in June on the undertaking he presumably made in February.

The two quite different groups are very concerned about the formula for quite different reasons, the English language community and the nationalists, too. It is very unfortunate, I am sure, as Ed says, that this is what has happened; it is very unfortunate that there is this



divergence between the two texts, because it lends itself to non-innocent interpretations.

PROFESSOR SYMONS: Mr. Bourassa, as I recall, claims that Mr. Robarts endorsed his interpretation, and there is a little special delicacy there. Do you remember in his statement Mr. Bourassa said, "Mr. Robarts has endorsed my view."

THE CHAIRMAN: I don't think that was quite accurate.

PROFESSOR SYMONS: I didn't think so, either, but he did claim it.

THE CHAIRMAN: I wonder, would it be helpful, if there are copies of the communiqué which are about, Ed, if we just perhaps worked through this systematically?

PROFESSOR CREIGHTON: We didn't get a copy of this at all.

MR. GREATHED: Yes.

PROFESSOR CREIGHTON: I didn't.

MRS. WILENSKY: It was included in the package with all the other documents from the conference, some of the opening speeches by the other Premiers.

MR. GREATHED: I am sorry, Professor Creighton. We will make sure you get a copy.

PROFESSOR McWHINNEY: Did you include both texts, though? I think Dr. Creighton and others would really want to examine them themselves.

MR. GREATHED: We will make sure they get



them.

THE CHAIRMAN: If you would like to run through here and pause for any particular areas for clarification or any observations you might have about these points, it might be the most useful way of getting up to date and getting some guidance. So, Ed, if you would just like to take us through ---

MR. GREATHED: Well, the first section is on patriation, and here I think the proposal at the bottom of page 1 and top of page 2 is a fairly simple one and really, I think, self-explanatory, as probably most members have looked at it. If there are any comments, again, we would appreciate them.

I think in the discussions we have had on this question in the Advisory Committee, I have not sensed that this particular procedure which was proposed here was objectionable or did not meet the kinds of concerns that various members of this Committee had about any proposed patriation formula.

PROFESSOR McWHINNEY: I think the term "patriation" is objected to by various people. Claud Ryan thinks it is an Anglicism.

MR. GREATHED: Well, it may be. I have always wondered about the term "patriation" and how you repatriate something that has not been patriated.





MR. PERRY: Never been there.

PROFESSOR McWHINNEY: I know Bill Lederman claims paternity for this, but I thought it was a Galicism, at least a Latinism -- "patriation", but I find a leading French Canadian saying it was an Anglicism.

PROFESSOR CREIGHTON: What does he propose? Have you got any words?

PROFESSOR McWHINNEY: He preferred nationalisation.

PROFESSOR LEDERMAN: I stand by what I said at our last meeting on this subject. It is in the Blue Book and I won't repeat myself.

MR. GREATHED: Are there any specific comments, then, on that specific section, because, if not, we can move on to the amending formula.

PROFESSOR SYMONS: I think the wording is a little loose and unfortunate. the use of the term 'British'. If you mean United Kingdom, I think "United Kingdom" should be used throughout. Canadian passports do say that Canadian citizens are British subjects. This may or may not be an anachronism, but it is the law for the moment, and I think where "British" is used they should substitute "United Kingdom".

PROFESSOR McWHINNEY: Is "United Kingdom" still a protocol term? I thought they changed it to "British Embassy", instead of "United Kingdom". I thought "United Kingdom" had been dropped by the



British government.

PROFESSOR MEISEL: What is the country called?

PROFESSOR McWHINNEY: Great Britain. It is still, in U.N. terms "Royaume Unie", but you notice the names of the embassies have been changed.

PROFESSOR SYMONS: If there is that change, it should read "Parliament of Great Britain".

MR. GREATHED: Under the amending formula, there are basically three sections set out on pages 2 and 3: one on the general procedure, and then the specific sections as applying to the federal and provincial constitutions, and finally a third section at the bottom of page 3, "Amendments of Concern to Canada plus one or more but not all provinces". Again, if the Committee has any comments on this, I would appreciate them very much.

PROFESSOR CREIGHTON: On page 2, Mr. Greathed, "Resolution of Consent at the Federal Level" that means the usual resolution endorsed by both Houses?

MR. GREATHED: Yes.

PROFESSOR McWHINNEY: That is a bad term, I think, "Resolution of Consent." There is a more formal term for that. We might perhaps ask Professor Brady.

PROFESSOR CREIGHTON: That is what I was wondering.



PROFESSOR McWHINNEY: It is not a term of art, "Resolution of Consent", and it is not precise.

PROFESSOR CREIGHTON: It says in (b) at the bottom of page 1, "Approval by Resolution in the usual way". That is, by legislative process in the two Houses of Parliament.

PROFESSOR LEDERMAN: The usual way is by joint address.

PROFESSOR McWHINNEY: "Joint address" might be better.

PROFESSOR CREIGHTON: I think it is a rather casual way of putting it.

MR. DICK: I was going to observe, Mr. Chairman, that the reason it is so casual is because no person was quite sure what really they had in mind as to how this would be done. I don't think they wanted to lead to the presumption it would be, for instance, Joint Address, and for that reason they probably called it that.

PROFESSOR CREIGHTON: In other words, it might be Mr. Trudeau's Cabinet.

MR. DICK: It might conceivably be Mr. Trudeau.

PROFESSOR McWHINNEY: There is still the defect that it is not a term of art, and it does not have a precise connotation.

PROFESSOR LEDERMAN: But it does say,





"Approval by Legislatures, plus the two Houses of Parliament". That means some kind of procedure whereby you get a parliamentary vote and a majority in parliamentary bodies, I would think, which is the crucial point.

MR. POSEN: Mr. Chairman, I believe in the House of Commons Mr. Trudeau was asked if he contemplated putting any agreement before the House, and he answered the Opposition in the question period that "Yes", that was the procedure that he envisaged.

MR. GREATHED: Under Section 2 is there any comment there?

PROFESSOR McWHINNEY: The point did come up in certain discussions in Quebec about "British Parliament legislates to make any consequential appeal or amendment of British Statutes affecting the Canadian Constitution". I think people making this point were commenting more on the French version, which may not be exact here, but of course there was a suggestion that this went beyond, as it stands; that this might have rather surprising effects on past equitable British laws. I would really read the French text to see if that is the one.

MR. GREATHED: I suppose the same comment under number 3 that Dr. Creighton raised under number 1 would apply. We have made a note of that.

PROFESSOR McWHINNEY: As I say, the people



I spoke to about this were talking in relation to the French text, but one comment was made in relation to the Statute of Westminster, and various other statutes. Is it general enough to catch these sort of things? Presumably not intended.

MR. PERRY: Are there any further comments on patriation or the amending formula?

PROFESSOR CREIGHTON: Mr. Chairman, has Quebec indicated a willingness about 2(a)?

MR. GREATHED: This is the bottom of page 1, Tom?

MR. PERRY: Which 2(a) is that, Tom?

PROFESSOR BRADY: Functions of the Queen?

MR. PERRY: There are several 2(a)'s.

MR. GREATHED: I am sorry, Roman II, small "a" on page 3. Your question again, Tom?

PROFESSOR SYMONS: Is there some indication that this would be acceptable to Quebec?

MR. GREATHED: They have not raised any specific objection to the best of my knowledge. My colleagues may correct me on that. I haven't heard any objection.

MR. GATHERCOLE: I was just curious in that matter of the formula about 25 per cent of Canada's population, with the swing in population in other parts more favourable to other parts of Canada, whether Quebec ultimately might drop below 25 per cent.

MR. STEVENSON: But it says "is now 25 per



cent or over or in the future", so since Quebec is over 25 per cent now it cannot be excluded later.

MR. GATHERCOLE: I see.

PROFESSOR McWHINNEY: What could happen, that could have rather astonishing effects in the future. Frankly, without explanation I wonder how anybody can agree to this.

MR. STEVENSON: Quebec quite conceivably could drop by the year 2000 to 21 or 22 per cent of the Canadian population, but this was put in specifically "is now" in order to preserve that Quebec level.

PROFESSOR McWHINNEY: I can really see this "camisole" divorce coming into operation with the population movement, if it means any province presently with 25 per cent and any in the future.

MR. STEVENSON: Although I cannot see, given the current ten provinces, any other province besides Ontario and Quebec reaching 25 per cent.

PROFESSOR McWHINNEY: British Columbia.

MR. STEVENSON: British Columbia is only about 11 per cent.

MR. GREATHED: 11 now.

PROFESSOR CREIGHTON: You perpetuate the veto.

MR. STEVENSON: Yes.

PROFESSOR CREIGHTON: For a particular part





of the country.

PROFESSOR McWHINNEY: And accentuate the veto.

MR. GATHERCOLE: Quebec is about what, 27 per cent now, or a shade more?

MR. STEVENSON: 28.

MR. GATHERCOLE: 27 to 28. It is conceivable, then, before the year 2000 that it would be, well before then.

PROFESSOR BRADY: You don't perpetuate the situation forever.

MR. GATHERCOLE: This is what it would be.

PROFESSOR BRADY: After all, the Constitution can be amended.

PROFESSOR CREIGHTON: How could you prevent it being perpetuated? There are no means of not perpetuating it.

PROFESSOR McWHINNEY: As I say, that is one that really slipped through.

PROFESSOR CREIGHTON: World without end.

MR. DICK: Amen!

PROFESSOR SYMONS: Don't you think it is quite conceivable, Mr. Chairman, that with this development of the Northwest and if there is a division of the Northwest Territories and the Yukon and so on, grouped with provinces like Alberta and British Columbia, it is quite conceivable that either of these provinces would move up towards this figure?

PROFESSOR CREIGHTON: Almost predictable



that Quebec will drop below 25 per cent.

PROFESSOR McWHINNEY: With the present immigration trend, 53.8 per cent of the immigrants go into Ontario, and the Quebec figures now down to 12 or 13, it is way, way down, I am sure this will happen and fairly quickly.

MR. DICK: Isn't that the whole reason why this type of thing was absolutely essential in Quebec's eyes? I don't think anybody is more aware of that than they are, and they obviously are not going to get themselves in the position of being faulted out because of the Pill and immigration. They have faced it and this is the result. So if they get locked in, it also recognises British Columbia's ambition that when it reaches 25 per cent it will be allowed in. So it is all things to all men, but whether ultimately everybody is going to receive it ---

MR. STEVENSON: You may think it surprising, but there was certainly unanimous agreement, I think, on the principle of that federal meeting by all provinces from the outside, before even a specific formula was developed.

MR. DICK: It was Alberta's paper, was it not, which right off the bat acknowledged that Quebec should have the veto, and we noticed this before.

MR. GATHERCOLE: We won't get agreement otherwise.



MR. STEVENSON: Exactly.

PROFESSOR SYMONS: One other issue, Mr. Chairman, just looking ahead a bit -- "and any other province that hereafter attains 25 per cent of the population". Supposing in the next growth phase British Columbia, perhaps an enlarged British Columbia, for a period of time achieves 25 per cent and then drops below 25 per cent. Is it then entrenched with the veto? Any province that achieves 25 per cent momentarily is then entrenched with the veto?

MR. GREATHED: Yes.

PROFESSOR McWHINNEY: It is the normal interpretation, so you get a triple veto.

MR. PERRY: Not likely they will achieve that during their centennial year, though, even for a day.

MR. DICK: Might have a special census all of a sudden.

PROFESSOR LEDERMAN: This is going to be tied to the decennial census, is it?

MR. DICK: We don't know.

PROFESSOR LEDERMAN: It will have to be.

MR. GREATHED: I would assume so.

PROFESSOR LEDERMAN: It would have to be applied to a definite census year and figure.

MR. GREATHED: We have no other basis for information of that kind.

PROFESSOR LEDERMAN: It will have to be





done that way, but, of course, if you are only going to take a census every ten years, at the nine year point your population figures may be quite out of line. They have been taking a census every five years out in the west because of the growth in the earlier years, the things it depended on.

MR. PERRY: It would appear then that the virtual right of veto given Quebec was discussed and recognised and accepted, was it?

MR. DICK: Very much so.

MR. PERRY: Why should we be worrying about it?

MR. GATHERCOLE: I was just interested in whether this would cover it or not.

MR. DICK: I just wanted to make the observation that when we say it was agreed to, it was agreed to in the sense that, for instance, Alberta had indicated it led in saying this, but whether when it gets down to the ultimate front in say, June, everybody is going to receive it with the same unanimity, we don't know. At this February conference there certainly was not outspoken opposition by any province to it.

MR. GREATHED: None whatsoever.

PROFESSOR CREIGHTON: You agree that this was agreed to be considered and no more: yet the apparent assumption is that it will go through.

MR. DICK: Yes, because there was so little objection taken to it, and it is of such



fundamental and obvious significance that it is just hard to think anybody would keep their silence in February and then suddenly rear up against it in June, although it is possible.

PROFESSOR McWHINNEY: It is dangerous for constitutional drafting to get into mathematical percentages, because you get into difficult fact-finding issues. If it was intended to give Quebec a veto, it would have been better to say so openly.

The time at which this comes into operation is going to be crucial, because of Quebec's 27 per cent now. Three years from now it may be 24.8 per cent. You are going to get into your Saar plebiscite style, as to who was a national at which stage. I think this is in general bad constitutional draftsmanship to get into a mathematical formula, but it may have been felt necessary to do it. You had better tie it in precisely to a particular census or a particular objective method of determination fixed at a particular time.

MR. GREATHED: I think this whole communiqué contains a series of ideas. Whether the final draft will look exactly like this is another question.

MR. STEVENSON: They would have to tie it to something specific.

PROFESSOR McWHINNEY: Quite specific,



quite objective, and no room for argument on it.

MR. PERRY: Gentlemen, we have apparently less than an hour before we move off to the hotel, and we are only on page 2. Could we move on?

MR. GREATHED: Could we move to page 4, fundamental rights. Here I think is evident that the consensus that was obtainable was on what had generally been described as basic political rights.

PROFESSOR LEDERMAN: I like the look of this section, Mr. Chairman, because I think really it looks as if the position that Ontario has rather consistently adopted on this matter has come through: and provided it is highly selective and focused on the basic political rights, and given that it is in conjunction with a reasonably flexible amending formula (which I think it is now). I am glad to see it. It has the inevitable qualifications in the paragraph there, that none of these rights can ever be unlimited, and you are in the hands of the Courts about what limitations on freedom of expression are permissible.

PROFESSOR McWHINNEY: You will agree though, Bill, that never have so many weazel words been packed into so short a space of time. Is it sensible to put them in? They will be implied by judicial interpretation, as you get with unqualified sections like the article on Bill of Rights, but that last paragraph is certainly a





collection of weazel words.

MR. DICK: Would you believe there are some of mine that they didn't put in?

PROFESSOR LEDERMAN: Well, the great model for this sort of thing is surely the U.N. Declaration.

MR. DICK: Right.

PROFESSOR LEDERMAN: And it is the U.N. Declaration as it stands, more or less.

PROFESSOR CREIGHTON: I don't think the U.N. Declaration is a model to be followed.

MR. DICK: I thought the U.N. was general in the extreme. We almost went to the European, which is even more restrictive: even attempted to add to that some of our own variations.

PROFESSOR McWHINNEY: You have got "reasonably justifiable or correct", health or morals, fundamental rights -----

PROFESSOR CREIGHTON: Everything is in there except the kitchen sink.

PROFESSOR LEDERMAN: Well, you do have the assertion of your general principles established and getting into authoritative form, and I think this is valuable.

PROFESSOR SYMONS: Mr. Chairman, I was puzzled by the inclusion here of the term "morals". As a desperately immoral person myself. I feel threatened.

MR. PERRY: Did you say moral or immoral?

PROFESSOR SYMONS: Desperately immoral. I



am seriously puzzled. What on earth is the word "morals" doing in this constitutional document? Health, maybe yes; fundamental rights and freedom of others. What are these morals we are going to entrench?

THE CHAIRMAN: Conventional ones.

MR. DICK: A lot of discussion arose around this, because one of the very critical areas that we have at the moment is the criminal law of the nation and how far it should go in delving into what we are rapidly coming to consider a matter of morality rather than a matter of criminal law. Your Bill of Rights, and the concern I think of most provinces with respect to an entrenched Bill of Rights, is what it is going to do to your existing Criminal Code of Canada, and your laws of evidence, and so on.

I say with all candour that from what has happened in amendments to the Criminal Code in recent times -- gross indecency between consenting males and so on -- there is obviously a change and there will obviously be more changes. Just where this is going to end up and what the ultimate national acceptance of morality is going to be, we don't know; but I think "morals" appears in there because of an uncertainty as to -- well, if you leave it out and ultimately there is a switch and criminal law comes back to be more closely associated with morality and there is no



mention of morality in this, that is, your Criminal Code is then not included perhaps in some of the possible exclusions.

PROFESSOR CREIGHTON: Are we actually talking about sexual morality alone or ---

MR. DICK: No. Look at the problems we have had in recent years with public servants and the breach of trust provisions of the Criminal Code. Our Court of Appeal on occasion has said that the only question involved in the term "trust" and "breach of trust" is the theft of property: that the highly sophisticated things that public servants are engaged in now -- and I go back to the specific case of the Director of the Securities Commission who trades in information. He himself steals nothing, he himself gets nothing, but he deals in information which ultimately is to the prejudice of a large segment of the community. The Court of Appeal at one stage said that was not a breach of trust. In the Courts' sense of morality in the term of "trust" and fiduciary relationship as distinct from property rights and theft, they got into a very difficult area.

Now, that is quite unassociated with sexual morality. It was a question of morality and man's nature in relationship to his fellows.

PROFESSOR McWHINNEY: It can only be in the context of (a), (b), (c), (d); it can surely only be intended to retain controls on obscene literature,





obscene expression or something of the sort; and "morals" here anyway is conditioned by the term "health", despite the disjunctive "or", so I don't think this breach of trust position has any relationship to (a), (b), (c) and (d).

MR. DICK: I agree, but I mention it in reply to Donald's question about sexual morality.

PROFESSOR CREIGHTON: It is mainly sexual morality they are talking about, isn't it?

MR. DICK: In my view it is more than sexual morality.

PROFESSOR McWHINNEY: But really all it can do in the context of rights for (a), (b), (c) and (d) is reserve potential control for censorship of films and books and that sort of thing. Surely it cannot be anything more than that.

PROFESSOR CREIGHTON: It is entirely objectionable.

PROFESSOR McWHINNEY: As long as people know what they are voting for when they agree.

PROFESSOR CREIGHTON: The whole idea is a horror.

PROFESSOR McWHINNEY: This is the trouble with the weazel words: they cover the compromise, but if in fact people were taking a stand on this, I think it is better to say it openly.

PROFESSOR CREIGHTON: Nothing should be in there except national security and public safety, or something like that.



PROFESSOR SYMONS: Mr. Chairman, the term "morals" is a loaded term. I understand the explanation that Rendall has given and see the wisdom of it, but it will be open to all sorts of wild misinterpretations and speculation. It would be a happy thing if we could find some other descriptive term for morals.

MR. DICK: I agree. I would think, quite frankly, while I have expressed some of the reasoning why it is probably appearing in there, I would think it will come out. Just as there is some concern expressed about freedom of thought, conscience and religion. The expression of that in that form is new in our country, certainly, but these words are there because obviously they have new meaning today, and I think they went in for the same reason that "morals" will probably come out.

PROFESSOR McWHINNEY: I would suggest that you strike the last paragraph completely and make the very basic point, which may need to be made to other provinces, that no constitutional system has ever construed these postulated -- they are called "freedoms" here, not "rights": but nobody has ever construed them in an absolute sense and judicial interpretation, and all democratic countries have recognized they are qualified rights and certain principles of public interest also come in.



I think this is a bad last paragraph. It is so full of weazel words. It means people are agreeing to things with quite different impressions of what they agreed to.

Why don't you strike, or suggest -- you may not get away with it, but I think it would be a constructive step to put forward.

MR. GREATHED: We can't strike it from the communiqué: that is too late.

PROFESSOR McWHINNEY: No.

THE CHAIRMAN: I have always been considerably interested in where, in terms of law, notwithstanding the fact that it is qualified by the term "political" rights -- and in this kind of society that is a pretty broad term: when you talk about freedom of thought, conscience and religion, how do you reconcile that with laws on any matter such as abortion, marijuana, what-have-you. where does this get rationalized in the legal process?

PROFESSOR McWHINNEY: It is handled by judicial fact-finding and changing judicial community values. The most absolute statement of these civil rights is in the American Bill of Rights, but you get a constant change in the meaning and content of the American Bill of Rights. Freedom of expression, freedom of speech, freedom of religion -- you know, in 1940 strikes down in State A, for example, the school bussing system but





in 1970 it is capable of covering it. I think this is the normal process of community growth. The undesirable thing, I think, is trying to jell the community qualifications in terms of formulae. Weazel words just are not formulae, and they create the problem that Mr. Bourassa agrees to this thinking it is one thing, while Mr. Davis and Premier Bennett think it is quite different.

PROFESSOR LEDERMAN: I would like to enter a dissent, Mr. Chairman. I think it is valuable to state these essential political freedoms in general terms, but I think it is also honest to advise everyone who reads the document that there are qualifications on these general assertions, and your qualifications have to run at the same level of generality as the positive assertions.

The danger of this thing to me, would be to assert freedom of thought, conscience and religion and then have sixteen pages of exceptions: that would be the dangerous thing.

I have perhaps misgivings about the word "morals" and I think it could come out, but I see nothing wrong with the other general phrases: "such limitations as are reasonably justifiable in a democratic society in the interests of national security, public safety, health, or the fundamental rights and freedoms of others". I think that is just an honest assertion to everyone who reads, that there are qualifications:



and with terms this general, both in the positive assertions and the qualifications, you are putting yourself within the hands of the Courts.

As we have said many times in this discussion, once you specially entrench assertions of this kind, you are putting yourself in the hands of the Courts, and on these fundamental items I think, as I understand it, that has been the basic Ontario position. You entrench the basic political rights which are themselves the foundation of parliamentary democracy, and from that point on you trust the parliamentary process and ordinary statutes.

So I do not like the description of those words, with the possible exception of "morals" as weazel words. I do not think they are unnecessary. In the European community, the Council of Europe, they thought they should use them; in the United Nations Declaration they have used them. So that is my dissent.

PROFESSOR BRADY: The phrase "fundamental rights", of course, is subject to varied interpretations.

PROFESSOR McWHINNEY: You get into freedoms, and you are using technical terms and they are quite different; they have quite different connotations legally.

PROFESSOR LEDERMAN: We developed this in the McRuer Report for a hundred pages. I just



have nothing to add.

MR. GATHERCOLE: What is the distinction between rights and political rights? The difference between rights or freedoms and political rights? What does the qualifying "political" mean here, what is its significance?

PROFESSOR LEDERMAN: The great political right is the right to vote, which, you will remember in the original federal proposal was omitted entirely.

MR. GATHERCOLE: But why "political"? It is a right, it is a fundamental right; it does not have to be qualified by the word "political".

PROFESSOR BRADY: It is a right that is related to the working of the state, of the political system.

MR. GATHERCOLE: But it is not necessarily a political right. It seems to me to be a right or a freedom, fundamental right or freedom. "Political" does, in my mind, anyway, circumscribe the right.

PROFESSOR McWHINNEY: I think this is true. It suggests, frankly, it tends to answer the question in advance by suggesting the public power to control or abridge it.

The American Bill, as you know, does not use this political prefix. The right of free speech is a right that is separate from the political process; it is more fundamental than





the political process.

MR. GATHERCOLE: That is what I mean.

I think "political" is a circumscribing word that exercises a constraint on this. It just is not essential to be there.

THE CHAIRMAN: I don't want to intrude on this, but I think if we are going to be punctual we will probably have to quit here at quarter to twelve. I wondered whether in the remaining minutes the Committee would prefer to deal with any of these other subjects, or have a few minutes conjecture on what you learned last night.

PROFESSOR McWHINNEY: Supreme Court, Mr. Chairman, is one of the points in which there is a variation between the French and English text. I would have to have the French text to refresh my memory.

PROFESSOR CREIGHTON: Where, at what point?

PROFESSOR McWHINNEY: Page 5 -- the participation, if you wish, of the provinces in the processes of appointing. The French text does seem to give the provinces a more active role.

PROFESSOR CREIGHTON: "Participation" is a vaguer word than they use?

PROFESSOR McWHINNEY: They use a more precise word: it is a more precise connotation.

PROFESSOR MEISEL: Ian, it seems to me



this has been a very interesting kind of seminar on this, but we are not going to revise this document, obviously, and the only virtue in discussing it seems to be that at the next round some of the ambiguities that have crept into this paper should obviously be avoided.

I think there is a more general question about the next round which was raised yesterday evening, and that is that there seems to be a great deal of anxiety on the part of a lot of people about how this June session is going to go -- an anxiety which I share.

If it is founded on some realistic reading of what is happening, then I would think one ought to ask oneself what happens after June, if June is really a deadlock and produces nothing.

PROFESSOR BRADY: And yet, how September?

PROFESSOR MEISEL: Where does one go from there? I think this is a very broad sort of policy or strategy question that one ought to think about, and I think somebody should be prepared to face that before you ever go to the west coast.

THE CHAIRMAN: That is the great conundrum of Victoria, there is no doubt about that; what happens if it doesn't wash?

PROFESSOR LEDERMAN: I was wondering, Mr. Chairman, if Harvey Perry had a point about economics and social policy that he wanted to come



to before we adjourn?

MR. PERRY: If I had been looking at this thing I would have started at the back. This whole issue of who maintains the central responsibility or the responsibility for the main social programmes is crucial in my view; because the Quebec position is that they want the programmes and they want the tax revenues to finance them, and they have asked for 100 per cent of nearly all.

MR. STEVENSON: There is a difference this time, though.

MR. PERRY: I know there is, and I think they are taking this pretty seriously in Ottawa. There may be a way through that.

MR. STEVENSON: The difference is very odd in that the Castongay submission was a change from the previous 100 per cent demand or request that Quebec have the legislative authority over the form of social security programmes in Quebec, while not necessarily asking for the administrative or financial responsibilities. It is a shared cost programme in reverse, in a way. They say: "If you, the federal government, are concerned basically about losing fiscal capacity that turning over family allowances and old age security would entail, that's fine. You continue raising the money, only in the allocation that would normally be made to Quebec leave us the legislative flexibility to determine how that





should be distributed."

MR. PERRY: I have even heard of a more monstrous idea, that is that Ottawa would legislate in conformance with the expressed wish of the Province of Quebec.

MR. STEVENSON: They have never been very precise.

MR. PERRY: Ottawa's programmes would operate out of Quebec. I find this very difficult to conceive. There is a very major issue here, and I guess part of the difficulty is the obscurity of this as a condition in acceptance of everything else. In the past it seemed almost as if this was a condition.

PROFESSOR McWHINNEY: Is it your understanding, Mr. Chairman, that there is this package deal aspect of the whole thing; that the price of acceptance of the amending formula and so on is dependent?

Again, I believe there is (I would have to refresh my memory) a gap between the French and English text. The English text simply says "expression of sympathy for the Quebec position" but I think the French is a little more affirmative.

Was it your understanding that there was a package deal, that there would be acceptance of the somewhat unspecified Quebec position on social policy?

THE CHAIRMAN: My reading of how Quebec



conducted itself at that meeting was this, that I felt that the Prime Minister of Quebec hoped that the joining of the two things as a condition on his part would not be necessary if the rest of the people acceded to the view that there should be some tolerance of this position, and then it would not need to be put in terms of a contingency, and thereby would not need to be put in the way of a look under the head.

My reason for thinking that is that I felt Mr. Bourassa was trying to move the discussion in that direction, but I felt he was also getting some advice in the other direction. It seemed to me that the thing was going back and forth right at the conference table. I don't know if others here have that view, but I felt he was being pushed very hard into two directions. He kept asking for people to recognize this position and to move with him, so that in effect he would not come to the ultimate. That is what I thought was going on in his mind.

MR. PERRY: This is a very mixed position. I have just come through the experience of chairing a Committee of the Canadian Welfare Council to examine the federal government's security proposals. In the process I have re-read most of the Quebec statements on their social programmes, and they are far more original and imaginative than anything that the



federal government has yet produced. I just cannot help feeling sympathetic for their aspirations here; that they would make much better use of this amount of money than the federal government ever dreamed of making. Yet to accommodate this, this blows such a big hole in all the sort of standard arrangements, that it is very difficult to see how it could be done.

PROFESSOR McIVOR: Mr. Chairman, this document refers to the various aspects of Quebec's social policy that they would like to see implemented or recognized by the federal government, but it says nothing whatever about any further financial implications.

I wonder if I could ask Don: is it a fair interpretation of the remarks that there was nothing in the discussion at this conference that implied further diversion of tax or other revenue sources to the Government of Quebec in relation to this modification of policy as discussed here?

MR. STEVENSON: It was left very vague at the conference and, as I mentioned a little while ago, there was quite an obscure paragraph at the very end of Castongay's statement which said that Quebec does not necessarily want a fiscal transfer to cover these programmes, but it does want the legislative authority.

Now, the other problem was though that if





you read through the rest of the Castongay statement it does imply that the whole realm of social policy (or you might call it human resource policy) Quebec felt should be under exclusive provincial jurisdiction in the legislative sense, and would include a couple of other things that are now federal government programmes. About the only thing that was left out, was unemployment, and it was quite unclear as to how far the Quebec position extended. In talking to some of the Quebec people one got the impression that Old Age Security was very much negotiable and that might remain under the current system as part of the Old Age Security/Canada Pension Plan package. On the other hand, the Canada Manpower centres in Quebec which, according to Quebec people were just straight unnecessary duplications of Quebec centres and family allowances, would have to be transferred as an integral part of Quebec's social service programme.

The financial implications did not come up in a direct sense, except there was a lot of muttering from the federal side saying, "This is just financially impossible".

PROFESSOR McIVOR: It would represent a pretty fundamental shift, wouldn't it in Quebec's traditional position if they are going to urge further modifications in the social policy area here and yet be willing to forgo whatever the



additional financial implications would be and say "We are not concerned whether the sources are transferred to us or not.

We are willing to see the administering and financing of these funds from federal sources" -- something quite different.

MR. STEVENSON: I would think, speaking for myself at this point, that there is nothing that could be of more help to this government than some ideas, perhaps, from people like you as to whether or not you see room for some Ontario initiative somewhere between the Quebec and federal positions. Because the federal position has been very strong. It just cannot see any diminution of the fiscal responsibility for these major programmes; and yet there is within the federal government a feeling on the part of some that the Quebec programme proposals may be better.

MR. PERRY: Did Castongay never report what the federal government should have produced and didn't? Their paper is dreadful by comparison.

MR. GATHERCOLE: Mr. Chairman, is there any concern being expressed, on the part of Ontario, over this provision which is outlined under "Regional Disparities", that it does introduce and embed in the constitution a sort of mechanism by which very substantial distortions in the whole tax raising and spending



programme can be carried out?

I recognize that the members of the federal parliament are representative of all parts of Canada. On the other hand, it is a rather radical departure from the former constitution, to embed in the constitution a provision which would allow and give assent to very substantial redistribution of the whole spending programme.

Is there any concern -- that is my point -- as to the emphasis which would be placed on this of removing regional disparities, and showing that there are the same opportunities in all parts of Canada?

THE CHAIRMAN: There certainly has been a lot, George, as you can imagine, but by the same token it has not been an easy thing to stand against either, because it is the one item that so many of the other provinces have made as their primary consideration. I think probably there was a good deal of realistic awareness of the difference between setting this out as an aspiration and the problems of realizing it. It has been a very difficult one to deal with all the way through.

Well, I suppose it is fitting and proper that on this inconclusive note we should terminate our proceedings. There are just three brief announcements in so doing. First of all, to convey John Conway's apologies for





his absence. He was there last night, as you know, but he had to leave for Vancouver today because of a family illness, so he regrets that he is not with us.

Secondly, I would like to thank our faithful recorder, Mr. Pettet, who has been with us throughout. We hoped very much that he would join us at lunch today, but he has a higher calling in that his daughter is being married, so that has priority.

Thirdly, perhaps the easiest way to get to the Park Plaza is the bus which leaves from the front door. On the other hand, in view of the time we can certainly look out for some taxis.  
--- The meeting concluded at 11:50 a.m.

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